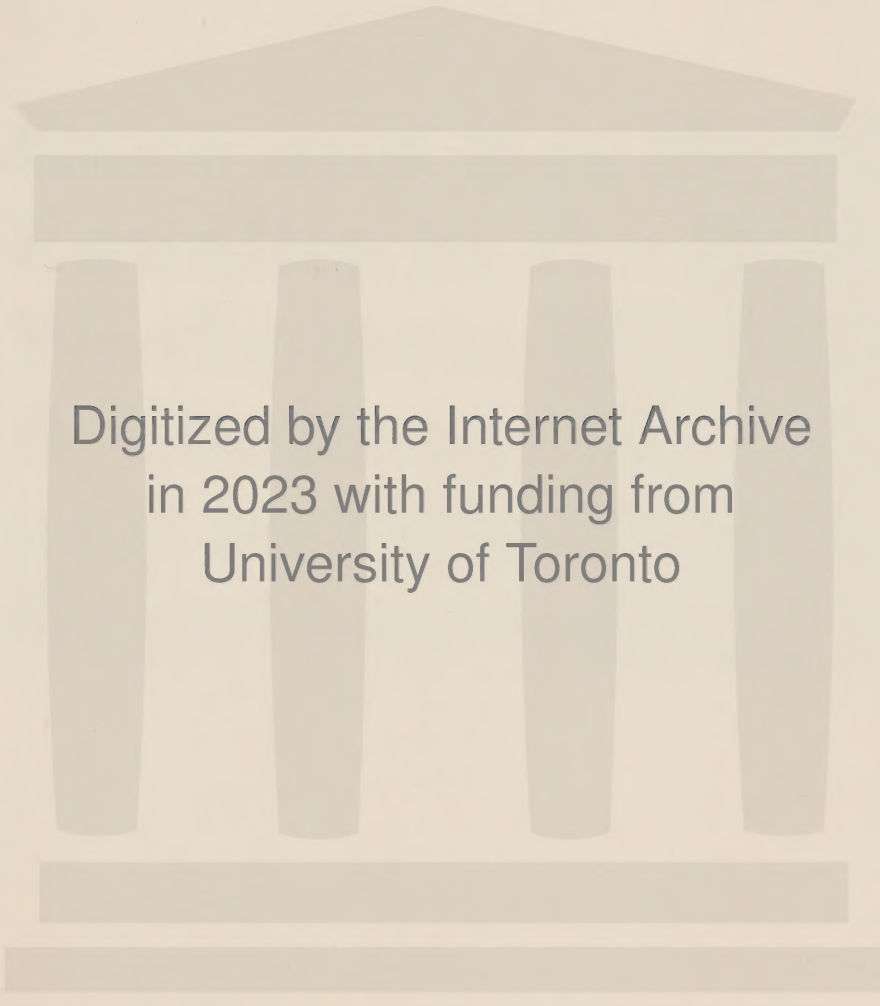

Race and Sex Equality in the Workplace: A Challenge and an Opportunity

Labour Canada
Travail Canada

Race and Sex Equality in the Workplace: A Challenge and an Opportunity

Edited by

Harish C. Jain, Ph.d.
Professor, Personnel and Industrial Relations Department
McMaster University

and

Diane Carroll
Women's Bureau
Labour Canada

Proceedings of a Conference

Sponsored by

Industrial Relations Research Association, Hamilton and District Chapter
Faculty of Business, McMaster University

in co-operation with

The Canadian Industrial Relations Association

McMaster University
Hamilton, Ontario
September 28-29, 1979

Women's Bureau
Labour Canada

Bureau de la main-d'oeuvre féminine
Travail Canada

Published by Authority of the Minister of Labour
Government of Canada

Également disponible en français sous le titre

Égalité des races et des sexes en milieu de travail:
un défi et une chance

Additional copies may be obtained from:

Women's Bureau,
Labour Canada,
Ottawa, Ontario
K1A 0J2
(819) 997-1550

Cat No. L38-33/1980 E

ISBN 0-662-10886-8

FOREWORD

In September 1979 the Conference on Race and Sex Equality in the Workplace: A Challenge and an Opportunity was held at McMaster University in Hamilton, Ontario. This conference brought together experts from government, private industry, unions, minority group and women's organizations, and the academic community in order to promote a better understanding of human rights legislation, to gain an understanding of current equal employment and affirmative action programs and to recommend action-oriented equal employment, compensation, and affirmative action policies.

The participation of the foremost authorities in this area of concern prompted the Women's Bureau of Labour Canada to undertake the publication of the proceedings of this conference and to ensure its wide distribution. As Conference Director, I would like to thank Dr. Ratna Ray the Director of the Women's Bureau, on behalf of all the conference participants, for making this publication possible.

The IRRA Hamilton and District Chapter gratefully acknowledges the financial support of the Department of the Secretary of State in partial funding of the conference.

Professor Harish C. Jain,
Conference Director,
McMaster University,
March, 1980.

Conference Planning Committee:

Naresh Agarwal
McMaster University

Lorraine Baker
Canadian Employment and Immigration Commission

Daniel Benedict
United Automobile Workers

Ian Hamilton
International Harvester

Rose Lees
Ontario Public Service Employees Union

Morag MacNeil
McMaster University

Paul Steele
Canadian Employment and Immigration Commission

John Vespa
Municipality of Metropolitan Toronto

Michael Walsh
McMaster University

Frank Zinszer
Hamilton Brick Company

Conference Director:

Harish C. Jain
McMaster University

TABLE OF CONTENTS

WELCOME AND INTRODUCTIONS

Dr. Arthur Bourns
President and Vice-Chancellor
McMaster University

Dr. Andrew Szendrovits
Dean, Faculty of Business
McMaster University

Professor Harish C. Jain
McMaster University
President, IRRA

(Dr. Arthur Bourns)

Ladies and Gentlemen:

I take particular pleasure in welcoming you here this evening to the opening session of this conference on the important topic "Race and Sex Equality in the Workplace." The specific topics that have been listed on the program and the distinguished speakers who will address them promise that your discussions will be both vigorous and stimulating.

Your presence at this conference clearly indicates that you realize that this general topic, and the various themes within it which you will consider, are issues central to modern society, particularly in Canada and the United States at this point in our history. These are thorny issues because they are seen so differently by many people; they are emotional issues which, in these times of rapid and disturbing change, come face to face with firmly established habits and patterns of thinking. The issues reflect deeply felt concerns about new social values, new roles for men and women as well as the increasing numbers of Canadians of different racial extraction who are finding their place in our communities. These concerns are being expressed with considerable resistance to recent and proposed legislation that tries to encompass and rationalize these changes and thus encourage reasonable attitudes and standards for the community.

In your discussions, you will no doubt debate the meaning of certain value-laden terminology that lends itself also to sharply different interpretations. Perhaps I can best illustrate my point by referring to the recent controversy between American Blacks and Jews with respect to the concept of "quotas." To many American Blacks, the establishment of participation quotas for non-Whites in certain areas of education and employment seems to be a beacon of promise, a goal devoutly to be realized and defended. To many American Jews, on the other hand, quotas recall the hateful restrictions that denied them admission to numerous areas of employment and education, areas in which they wished very much to participate on an equal basis with all their fellow citizens. Thus, for one group the term "quota" means greater opportunity: for the other, a discriminatory denial of equal opportunity. It is a matter of perspective and history that determines which interpretation is considered correct.

In another vein, the question of equality for the sexes in the market place is also an emotionally-laden issue. It is well known that many studies have described the obstacles and inequality that women experience in the market place, not only in the range of employment open to them but also in the opportunities for advancement. In these times of financial constraints, the advance of any group, however well justified, may well be perceived by others as a threat. Witness the recent debate in the editorial columns of some newspapers about proposed legislation suggesting that "Equal Pay for Equal Work" should be amended to provide "Equal Pay for Work of Equal Value."

In this connection, you will be interested to learn that at McMaster, we have established a committee to compare salaries of male and female faculty members in order to be certain that no inequities exist. This committee, while it is proceeding with its work, has had to deal with certain problems such as allegations that its mandate was not sufficiently comprehensive and some apprehensions that the information it required constituted an invasion of the privacy of certain faculty members.

I am, therefore, persuaded that the issues which you will be discussing at this conference are fundamental questions for all who are concerned not only with equality but with equity in the market place. The words "challenge" and "opportunity" which indicate the direction of your discussions are clearly relevant and realistic. I hope that your discussions will lead to new levels of understanding that will constitute the basis for continuing dialogue and significant progress in the days ahead.

(Dr. Andrew Szendrovits)

I would like to welcome all of you to the conference on race and sex equality in the workplace. The Faculty of Business is pleased to cosponser this conference jointly with the Industrial Relations Research Association in co-operation with the Canadian Industrial Relations Association. The IRRA, Hamilton and District Chapter, has played an important role in the Faculty of Business at McMaster University. This is especially so for our students majoring in the Personnel and Industrial Relations area. The seminars, lectures and conferences, organized under the auspices of the IRRA have brought together representatives of management, labor and government along with the academic community. This provided the students with useful learning experiences based on the "reality" they will face upon graduation, and useful contacts with practitioners in their field of interest. These events have also helped the members of our faculty with special interest in the Personnel and Industrial Relations area in exchanging ideas with the practitioners.

I addition to assisting the students and the faculty, we earnestly hope that the IRRA has also provided a forum for representatives of labour, management and government to exchange ideas in a neutral university environment.

I wish the conference a great deal of success in its deliberations.

(Professor Harish C. Jain)

It is a great privilege to welcome you all tonight to our first conference on race and sex equality in the workplace: a challenge and an opportunity.

The aims of the conference are to promote a better understanding of human rights in employment legislation among employers, trade unions, ethnic minorities and women; to understand the current equal employment and affirmative action programs and practices of employers and trade unions in the private and public sectors; and to recommend action-oriented equal employment, compensation, and affirmative action policies and programs toward minorities and women in the private and public sectors.

The Hamilton and District Chapter of the IRRA was established in 1972. During its seven years of existence at McMaster University, we have organized seminars, panel discussions, and speeches on a regular basis in order to promote and encourage research, reporting and critical discussion of research to advance the personnel and industrial relations field. In this task we have received valuable assistance from representatives of employers, trade unions, government and the academics in the Hamilton-Toronto area. All of these parties are represented in our membership and on the executive board.

At this conference on race and sex equality in the workplace, we are most fortunate in bringing together as speakers, panelists and resource persons, prominent Canadian leaders from trade unions, industry, government and the academic community.

We have also been able to persuade two noted American experts to address the conference. Both Mr. Robertson, until recently with the EEOC in Washington, D.C., and Professor Blumrosen have played a very important role in formulating concepts and policies we will be discussing at this conference at the highest levels in the U.S. government.

The participants of this conference come from all over Canada and represent ethnic groups, women's organizations, along with trade unions, employers, academic institutions and the government.

I am confident that the participants will bring to bear their experience and expertise in formulating action-oriented recommendations concerning equal value, affirmative action and seniority, promotions and layoffs as they affect minorities and women.

The conference comes at an opportune time in view of the impending human rights legislation at Queen's Park. The conference, it is hoped, would provide useful input into this legislative process as well as in the ongoing evaluation of human rights legislation elsewhere in Canada.

ADDRESS

By

The Minister of Labour

The Honourable Lincoln M. Alexander, P.C., M.P.

At the outset let me say how much I welcome this opportunity to return, albeit briefly, to McMaster University, the setting for many of my earlier endeavours in the learning process. I'm still learning.

I particularly welcome Professor Harish Jain's invitation to speak at this important conference. As Minister of Labour for Canada, the subject-matter of these proceedings, "Race and Sex Equality in the Workplace," is of special interest to me. And while I won't be able to participate personally in your various sessions I look forward to receiving reports on the proceedings in due course.

I applaud your expressed purpose of this conference: to promote a better understanding of human rights in employment legislation among employers, trade unions, ethnic minorities, and women; to gain an understanding of current equal employment and affirmative action programs and practices; and to recommend equal employment, compensation and affirmative action policies toward minorities and women in the private and public sectors.

I would emphasize that the Government is committed to bringing about equality for all Canadians. You may recall its commitment of last spring - a commitment "to a Canadian society where women and men have full and equal opportunity to realize their personal aspirations and to contribute to the building of this country."

I would reinforce that pledge today: I intend to see a full expression of that commitment, on a priority basis, to the extent of my Department's responsibilities and jurisdiction.

I need hardly say that the fulfillment of that pledge will not be easy or immediate.

The fight for equality - be it racial or sexual - has been, and still is, a seesawing struggle not only in Canada but throughout the world.

We need only read our newspapers to evidence this fact.

Here in Canada we face particular problems in the attainment of equality of opportunity for all.

We are primarily a country founded by immigrants. Since the middle of the last century there has been a vast influx of people from all over the world who have settled in Canada - without them Canada's growth would have been very slow indeed.

They have contributed in an immeasurable way to the greatness of our country.

Yet, at the same time, there is another side to this immigrant influx. These newcomers had to face formidable adjustment problems. They came from the four corners of the world bringing with them not only their sweat and determination but their own "cultural heritage."

They were people reared in an old world environment and inevitably confusions, tensions and emotional conflicts have developed as they strive to reconcile the ideas, values and attitudes prevalent in their new world with the social heritage acquired in their homeland.

It is generally acknowledged that in addition to the immediate problems facing newcomers of employment and physical survival, the most difficult problem, and the most difficult one to measure, is that of adaptation. By that I mean the process by which the immigrant acquires the memories, sentiments and attitudes of the dominant group and by sharing their experience and history becomes incorporated with them in the broad spectrum of cultural life.

It is also recognized that this "adaptation" is not acquired overnight; it is gradual and sometimes requires two or three generations before confusion, tensions, and emotional conflict are eased or erased.

When the newcomer is visibly different from the dominant group - the process is even longer and more painful.

I would also point out that the adjustment process is not only on the side of the immigrant. The established group also has problems of readjustment. It has to bend and accommodate the newcomers, redefine situations in a new way, make decisions which will be forward looking. The established group also has its confusions, tensions, and emotional conflicts.

One cannot legislate love, or morality, nor can one legislate against prejudice, but the Government can legislate against the overt act of racial discrimination.

I find it particularly interesting that labour in Canada played an instrumental role in human rights in the early days by driving for antidiscrimination legislation.

In fact, one of the most potent forces in the campaigning for effective human rights legislation in Canada 30 to 40 years ago was the labour movement.

The 1930s and 1940s witnessed labour along with organized minority groups such as the Jewish Labour Committee of Canada mustering support for antidiscrimination legislation.

Throughout the 1950s and 1960s, labour continued to play a prominent role in the drive for human rights legislation, particularly in the areas of race, colour, creed and nationality, and this is still going on.

Without union support, affirmative action in many of Canada's key industries was and still is virtually impossible. With it, the chances of a program succeeding are immeasurably enhanced.

I believe that we have to give a certain amount of credit to labour, along with organized minority groups, for contributing to our human rights legislation. However, legislation alone will never guarantee equal opportunity nor put an end to discrimination.

What must be accelerated is the pace of attitudinal change. And we must make the principle of sharing the modus vivendi, as well as modus operandi, of our country and of our workforce. Improvements to human rights legislation are beginning to help change attitudes. Shifts in life style have made a big contribution. But the fact remains that frequently certain individuals don't receive the recognition in the job market that their training and talents deserve. This is a deplorable situation which benefits nobody: not the individuals themselves, not the businesses that employ them (or don't employ them); and not Canada.

As you are aware, Labour Canada is vitally concerned with gaining equal opportunity for women in the workplace.

I would like to take this opportunity to place a greater emphasis on the rights of women. My Department has a Women's Bureau which I fully expect to take strong initiatives on behalf of working women in Canada.

As a matter of fact, when the Director of the Bureau was recently appointed, the press release issued from my office emphasized that the Women's Bureau will promote provisions of the Canada Labour Code to ensure that women fully benefit from the Code. The release also pointed out that the Bureau will keep a 'watchful eye' on policy and program developments at the federal level with respect to concerns such as equal pay for work of equal value, affirmative action and discrimination on the basis of sex.

The Department's Women's Bureau will soon begin an in-depth evaluation of the Canada Labour Code as it concerns bringing about this equality. This is a departmental initiative that complements programs of the Human Rights Commission.

The evaluation - which I hope will be completed by early next spring - may well lead to legislative strengthening and to new policy developments by Labour Canada.

I am aware, of course, that significant progress has been made in recent years in relations to the enhancement of women's equality. Labour Canada has contributed to this progress: and now the Canadian Human Rights Act is pursuing a case-by-case approach to elimination of discrimination. This Act put forward the principle that every person should be afforded the chance to use his or her talents to the utmost; that no artificial barrier be placed in the way; and that special programs should be instituted to help people "catch up" in the quest for fulfillment.

Undeniably, progress has been made. For example, between 1968 and 1978 participation by women in the labor force rose from 37 per cent to approximately 48 per cent.

In the 20- to 24-year age group, participation increased from roughtly 59 per cent to 73 per cent; in the 25- to 34-year group it was up from 35 to 59 per cent; and in the 35- to 44-year group it grew from 37 to 58 per cent. In fact, today's labor force contains more women, more young people and more minority group members that ever before. So we are moving in the right direction. But we are still far from witnessing the full acceptance of women - and minority groups - as equal partners in the world of work.

Consider, too, a few other facts and figures on the working woman:

* such as the fact that women earn, on average, only 55 per cent of what men earn;

* such as the fact that nearly half the families headed by women are below the poverty line;

* and that while nine out of every 10 top wage-earners are men, 72 per cent of people at the bottom of the wage scale are women.

We still have a long way to go before Canadians can honestly claim to have an acceptable degree of equity in the workplace. Traditional attitudes like "a woman's place is in the home" are very persistent; a 1975 survey indicated that a clear majority of Canadians - both men and women - still felt this way. This attitude was, however, considerably less prevalent among the higher educated and the more youthful segments of the population.

Other findings of that survey also bear repeating: for example, the substantial male resistance to the very idea that women should supplement the household income; and a widespread dissatisfaction among women with their chances for promotion - a substantially higher dissatisfaction than occurred among the men surveyed.

Resistance to women's full participation has still, quite obviously, to be overcome; resistance to accepting the legitimacy of women's equal status; and resistance to the equally legitimate aspirations of women for advancement within the enterprise.

To enable women to participate more fully, and more equitably in the work place, three major factors must be accepted:

* first, that society stands to benefit from effective use of all human resources, both women and men;

* second, that women have the right to participate in economic endeavours on the same terms and conditions as men;

* and third, that women are in the workforce to stay. Their participation is not transitory: it's an ongoing fact of life.

Having said that, it is perhaps necessary to stress that men ought not to feel threatened by the increasing number of the opposite sex who are now coming into the workforce. Equality in the workplace should not, and does not, mean the elimination of competition - which is both healthy and progressive.

Women's entry into the workforce does not mean jobs being taken away from men; the steady increase in job creation is a solid safeguard in this respect.

I mention again the importance of sharing. Sharing has to be seen as a vital requirement in virtually any human endeavour, if only because it reflects the reality of our interdependence.

Conferences such as this are an excellent way of drawing public attention to the need for a more equitable sharing of the work-place, thereby hopefully achieving a better utilization of our price-less human resources.

Before concluding these brief remarks I would suggest that much work needs to be done by both government and employers in this area of human resources, not least to avoid future replays of the massive skilled labour shortages that Canada faces today.

I hope that in the near future - with the co-operation of my colleagues, the Honourable David MacDonald and the Honourable Ron Atkey - I will be able to discuss these, and other concerns that I have referred to with senior industry representatives.

It seems to me that this country is long overdue in achieving a viable and just employment situation: one that has the advantage of men and women possessing the desired mix of talent and training, and one that offers, in return, adequate jobs for men and women in a non-discriminatory way.

Personally I intend to do my utmost to bring about these vitally important improvements. With our legislative review, and with our commitment for a generally more effective and equitable employment situation, I am confident that we are moving in the right direction.

ADDRESS

By

Grace Hartman

National President

Canadian Union of Public Employees

Before I begin, I would like to thank the conference organizers for providing this opportunity to discuss some of the difficulties in attaining race and sex equality in the workplace.

First let me say that I don't think we should kid ourselves; equality in the workplace does not exist! We're not even close and the evidence is everywhere. Who is doing the lower-paying menial work? Who is doing the filing, xeroxing and typing in any office? It's women. Who is cleaning floors and sweeping streets? Who is cooking the food and doing laundry in large institutions? Usually racial minorities.

Despite improved legislation, affirmative action programs, and a growing awareness of the problem, inequality persists. This is proof of the ineffectiveness of existing methods to promote equality in the workplace. And it also illustrates the strong resistance to promoting equality by those in positions of authority: the politicians and employers.

Let's look at some of the practices that contribute to racial and sexual inequality in the workplace. There is an undeniable attitude that women or racial minorities are not suited to jobs with better working conditions and higher pay. That's indicated by the employment tests and job specifications. Employers often require extensive training or qualifications in areas which are really not necessary for the job. In this way, they effectively limit employment opportunities for women or racial minorities. No consideration is given to the fact that these workers are less likely to have higher qualifications because this area may have only recently been opened to them.

Exclusion on the grounds of training also occurs to immigrants, particularly those from the third world. Often their experience or training in their own country isn't considered equal to that given here. A federal Department of Immigration study found that a lack of Canadian experience was the major reason for difficulties experienced by third world immigrants in finding employment. Fifty per cent of all third world immigrants requires three years to find jobs of their choice. This was far longer than it took those from any other countries, such as Australia, Britain or the U.S. Even though immigrants from these countries lacked "Canadian experience," they were still able to find suitable employment quickly. Discriminatory hiring practices seem to be the source of the problem.

But not all accusations of discrimination have been directed at employers. Sad to say, some unions have also been thought to discriminate in a number of ways.

Some claim unions have not made an all-out effort to organize non-White or female workers. This would result in smaller wage gains and less protection for these groups than for union members. However, most unions, including I'm proud to say, the Canadian Union of Public Employees, don't organize workers along these lines.

CUPE's organizing efforts, since its founding 16 years ago, have tripled the Union's membership. Clerical and health care workers, who are mainly women, account for a large portion of this increase. In the health care sector in Ontario alone, CUPE's membership has risen from 5 000 to 23 000. And in most health care institutions 80 per cent of the workers are women. As a result of this CUPE has the largest number of female members of any union in Canada.

Our membership includes a significant number of racial minorities, with the health care sector in Ontario probably the largest single employer of racial minorities. Statistics do not exist on union membership by race, but it is estimated that almost half of our health care members in major Ontario cities are recent immigrants.

CUPE, like many other unions, wants to organize all workers who will benefit from unionization, regardless of sex or race.

An area where unions have made great strides in breaking down the barriers to racial and sexual discrimination has been in forcing employers to accept the principle of seniority. It's hard to believe that in non-union workplaces such important matters as promotional opportunities, order of layoffs, preference for vacation, opportunities for training and so on, are decided on the basis of favoritism; employer likes and dislikes. It's this sort of situation which opens the door to discrimination. Seniority, on the other hand, offers the only objective procedure for making these important decisions.

It hasn't been easy to force improvements in this way. I'd like to give you an example of where we're presently having difficulty establishing seniority in an area which is of particular importance to women.

Many employers still disagree with the accumulation of seniority for women on maternity leave. This was an issue in our last round of negotiations with hospitals in Ontario. I'm sorry to say it was an issue we lost. Principles took a back seat to employer convenience.

My Union also represents employees of the Ontario Workmen's Compensation Board. This Employer considers itself enlightened in its so-called equal treatment of men and women --- even though it's one of the few provincial compensation boards that has not changed it name from Workmen's Compensation to Workers' Compensation.

This summer we negotiated the renewal of a collective agreement. One of the issues the Union was pressing for was seniority and service credits to continue accumulating during the period of maternity leave. You should have seen the resistance from the Employer. They said providing seniority for women on maternity leave would discriminate against those who continue working steadily, presumably men! This illustrates that discrimination against women's seniority is not confined to small industrial Employers. Large public employers are equally guilty.

Women and racial minorities have traditionally encountered discrimination in job classifications and job descriptions. Here, too, it's been an uphill fight. But small battles have been won. For example, CUPE has virtually eliminated the wage differences between Registered Nursing Assistants and Orderlies.

When we began to organize hospital workers there was a significant wage difference between largely male orderlies and RNAs, largely female. In 1971 a federal Ministry of Labour study found an average difference of $37 per month between male orderlies and female RNAs. In one hospital there was a $62 monthly difference between these classifications.

These pay differences existed even though female RNAs required a specialized training program of up to two years, in addition to their secondary school education. Whereas male orderlies required no special training and didn't need to complete their high school education.

But through determined negotiations in the past eight years, we have succeeded in equalizing the maximum rates for the Ontario orderly and RNAs without holding back orderly wage increases. However, the battle isn't over yet. Generally speaking, the starting rates for RNAs are still lower than for orderlies. Removing this inequity was a goal in our last round of hospital negotiations across the province and was strongly resisted by the employer.

This example brings me to the issue of equal pay. In the past few years there has certainly been a lot of talk on equal pay. Or perhaps instead of talk, I should say rhetoric, since overall, little has really been accomplished. On average, women still make only 60 per cent of the male wage. And this gap increased by over $3 000 between 1965 and 1975.

Many employers still refuse to recognize the equal value of work performed by women.

One obstacle to achieving equal pay is related to their segregated involvement in the labour force. Women are overwhelmingly concentrated in a few occupations. These jobs are characterized by low pay, monotonous work and little opportunity for advancement. Because of these characteristics the occupations are often referred to as "job ghettos." Office work is one of the most common examples.

Although pay is low compared to occupations where men are predominantly employed, the benefits of unionization for female office workers are clearly evident.

According to a 1977 Labour Canada survey, pay is significantly higher for female office workers who are unionized. For example, the average wage of unionized, junior female clerks was $21 a week greater than their non-union counterparts. This amounts to over $1 000 a year.

The same survey revealed that unionized keypunch operators, another predominantly female occupation, earned an average of $24 a week more.

For computer systems analysts, who are highly trained, the wage gap between union and non-union rates had grown even further. Junior female systems analysts, who were unionized, earned an average of $44 a week more than those who didn't belong to a union; a difference of over $2 000 a year.

From this data two points can be made. The first is obvious. Unionization clearly benefits female office workers by providing higher pay. Secondly, it appears that the more skilled female office workers are most disadvantaged by not being unionized. The figures show that the gap between union and non-union wages grows wider as job skills increase. In other words, it appears that the more skilled a female office worker is, the more undervalued her work will be, unless she is a union member.

Even for those who are unionized, the road to equal pay faces many obstacles. For example, last year my Union assisted a small local union of women employed by the Ottawa-based British American Bank Note Company, to achieve a wage rate commensurate with the value of their work. For years, this Company discriminated against its skilled female employees, who examine for errors bank notes, bonds, lottery tickets, postage stamps, and so on, by paying them less than unskilled male janitors.

The Union appealed under the Ontario Employment Standards Act to gain wage parity between the skilled female employees and the unskilled males. The request was denied because, even though the women were more skilled, their jobs were not the same as the men.

The Ontario Government's Employment Standards Act, which allows for equal pay for equal work, has been useless in eliminating pay discrimination on the basis of sex, since it requires that men and women do the same work. In effect, women cannot earn as much as men if they perform more skilled work.

The Union then appealed to the federal government to invoke that section of the federal Human Rights regulations which would deny government contracts to firms with a record of discriminatory practices. In spite of the fact that the Bank Note Company does a majority of its business for the federal government, the Government refused this request.

The Union then engaged in a nine week strike in an effort to win wage parity. The strike was settled by an agreement to refer the issue of the women's rate of pay, based on skill and responsibility, to binding arbitration.

In its presentation to the arbitration board, the Union presented a mass of information to show, that by any objective standard of job evaluation, the women's job was rated far higher than the job of the unskilled men.

In spite of this, the arbitrator, Owen Shime, rejected the Union's claim stating, among other things, that job evaluation was not appropriate to the printing industry. The arbitrator then went so far as to deny the Union's claim by charging the Union with "complicity" in discrimination since another group of members of the same union, employed by another employer, had signed a collective agreement with lesser rates for women.

So, after a year of negotiations for wage equality, appeals to two levels of government, a nine-week strike, and binding arbitration, the women still find themselves working for a tough employer who still pays skilled women less than unskilled men --- and enjoys the financial support of the federal government!

The problem of equal pay also exists for racial minorities. It's unfortunate that little research has been conducted on this form of racial inequality. And there is an absence of statistics on wage differences by race. The problem of racial inequality therefore, is not as apparent as wage inequality along sexual lines. But the problem exists and simply can't be overlooked.

The fact that race-related complaints made up 58 per cent of the Ontario Human Rights Commission's caseload in 1976 and 1977 proves that there is a very serious problem indeed.

The nature of inequality suffered by immigrant women shouldn't be ignored. They suffer a double burden because of the combined effect of their sex and their race.

Another type of inequality in the workplace I would like to mention briefly, is sexual harassment. It's an abhorrent form of discrimination against women.

Sexual harassment can include anything from verbal harassment, such as sexist remarks or pressuring for sexual activity, to unnecessary touching, patting or pinching, to the extreme of physical assault. Although a very high proportion of women in the workforce have experienced some form of sexual harassment, it has been, until now, a hush-hush matter. The seriousness of this problem is that the man is usually in a position of authority and a woman's objections to his actions can jeopardize her employment.

An interesting case of sexual harassment on the job was recently before the Ontario Human Rights Commission. It made possible $3 000 in damages and $500 in lost wages to a woman who had filed a sexual harassment complaint.

The woman, Maria Ballesta, was a young immigrant worker at a meat-packing plant in Toronto. A co-worker made sexual advances and physically assaulted her in front of a supervisor who didn't interfere. When she complained to her employer about the incident she was accused of lying and was dismissed. She then filed a complaint with the Commission on the grounds that she was discriminated against because of her sex. Her case was so clear-cut that the final hearing took less than 10 minutes to conclude a settlement.

It was a landmark case; the first on sexual harassment to reach the tribunal stage, and it has taken a long time to witness some success. Sexual harassment in the workplace has been a problem for many years. It's only recently that it is being recognized.

The forms of racial and sexual inequality in the workplace are varied and numerous.

Affirmative action programs are often thought to be the answer. They're specifically designed to remedy under-representation of minority groups in employment, training, or career development. They are meant to correct the results of a history of discrimination.

CUPE's experience with affirmative action programs has been mixed. In some jurisdictions, public employers have taken some real initiatives in implementing affirmative action programs. The Canadian Broadcasting Corporation, and particularly the Radio Network, is one with a relatively good record. At the other end of the scale is the Ontario Government and some of its agencies, particularly the Metro Toronto section of the Ontario Housing Corporation.

CUPE represents a bargaining unit of some 700 caretakers and maintenance employees at the Toronto OHC. It is a 100 per cent male bargaining unit. The employer has historically refused to hire female caretakers, even in housing projects with a high proportion of female single parent tenants. And the Ontario Government supports this form of discrimination with Section 17 of its Crown Employees Collective Bargaining Act which gives the OHC exclusive right to "determine employment (and) appointment" of staff. In other words, the Ontario Government, by statute, prohibits the Union at "OHC" from bargaining on the issue of hiring female caretakers.

The Ontario Government and its agencies should be model employers with affirmative action programs for women. Instead, the Ontario Government and the Metro Toronto OHC must be condemned for their discriminatory practices and legislation against women.

Based on experience, our Union feels that affirmative action programs must be backed up by the binding power of the collective agreement. We no longer expect employers to eliminate discriminatory practices as a goodwill gesture or because the employer suddenly becomes enlightened. We have to fight at the bargaining table and

even on the picket line if necessary, to really change the attitudes and practices of employers. In the workplace, we believe it's only the collective agreement which will guarantee our rights.

But in this period of government restraint and cutbacks it is increasingly difficult to achieve equal opportunities in the workplace. The Public Service Alliance, which represents the majority of federal public servants, has warned that present government plans for cutting 60 000 jobs in the federal public service will affect women and francophones most severely. These workers already suffer the greatest inequities in federal government employment. Independent studies as well as the PSAC's own research, has shown that the existing equal opportunities program for these minority groups has been a failure. The policy of restraint will only worsen the present discriminatory circumstance.

CUPE, representing employees in other areas of the public service, realizes that these same difficulties are the likely results of cutbacks at other levels of government.

In concluding, I'd like to say a few words about the agency which enforces legislation to prevent racial and sexual discrimination. First I want to emphasize that the creation of the human rights commissions was a very important step in preventing discrimination. But it must be recognized as only a first step, albeit a vital first step. Unfortunately, the reliance on voluntarism: that is putting the onus on individuals to bring their case to the commission--rather than actively checking and ensuring the enforcement of the law, inhibits the effectiveness of the legislation, which in turn, perpetuates discrimination.

As Professor Harish Jain has pointed out in his work in this area, most human rights commissions in Canada have adopted the approach that discrimination is the result of individual acts of bigotry or prejudice. Consequently, they tend to see their role as a conciliatory agent. Through education and persuasion they try to change discriminatory attitudes. I believe that a more active role of seeking out cases of discrimination, enforcing the legislation, and imposing strict fines for non-compliance would prove more effective.

Thus far, human rights commissions have failed to eradicate discrimination against women and racial minorities, largely because they concentrate on individual cases and individual attitudes. But these are not the main sources of discrimination. They are only reflections of it.

The real sources of discrimination are the social, economic and institutional forces which dictate the value of work.

In an economy that functions with few restrictions, profits are sometimes realized by undervaluing the work of employees by discriminatory practices. So within the economic system there is an incentive to discriminate.

Unions were originally formed for the purpose of promoting equality in our society. Their motto has always been: "An injury to one is an injury to all." And if that injury or inequality is based on sex or race discrimination, our task is to eradicate it. And we are actively dedicated to it.

ADDRESS

By

Thomas J. Carney

President and General Manager

Greening Donald Co. Ltd., Hamilton

At the outset, I wish to make clear that the views which I express are strictly my own -- I am not a representative of business, but a representative from business!

Your program for this conference has broken down the total theme into three convenient subsections, each of which will be the subject of a panel discussion and a workshop session.

I have, therefore, structured my remarks in line with these divisions and will approach the subject:

1. By separating the Ends from the Means - for example, Equal Pay in the Workplace, and Equality in Seniority, Promotion and Layoffs can be perceived as Ends. Affirmative Action Programs are Means to achieving these Ends.

2. By reviewing the Ends, to see whether some aspects of them should be attainable within a relatively short time frame; are there any areas where the End can only realistically be achieved over a longer time period and finally are there areas where the End, while socially desirable, may be economically unattainable.

3. I will move then to consideration of the "Means." The "Affirmative Action Programs." I will touch on Government Responsibility, Business Responsibility, and - most important, I think - Individual Responsibility.

4. Throughout my comments, I will introduce the "multiple role" concept -- in the case of business (a) its economic role in providing goods and services (b) its economic and partial social role in bringing together the factors of production, and (c) its social role as it attempts to adapt to changing social values. In the case of individuals (a) their producer role in the workforce (b) their consumer role in the marketplace and (c) their social role, in which, as members of various groups they become opinion makers, and leaders of social change.

   The question will arise -- Do we, both business and individuals, maintain a behavioral pattern which is consistent throughout each of these roles, or do our actions, in one role conflict with our actions in another?

"Ends" Equal Pay

Turning now, to consideration of the first of our "Ends" - Equal Pay. We are all familiar with the bare statistic "Women earn only 60 per cent of what men earn." Indeed in a study of U.S. businesses undertaken by Martha G. Burrow on behalf of the American

Management Association, the number is given as 58 per cent, and the comment made "Researchers have noted that 58 per cent is just 2 per cent less than the original constitutional value of a slave: three-fifths of a person." Similar studies in the U.S. of minority groups have produced similar results.

Before rushing off to the hustings however, and urging "something must be done," I believe it is essential to look behind this bare statistic, to find out the different underlying causes, and develop wherever possibly, solutions appropriate to each cause.

From the many possible causes, I have selected three, which I believe to be significant.

The first is the case of obvious out and out discrimination -- where the same task is being performed by a majority group male, a female, and/or a member of a racial minority, for different levels of compensation. At one time this situation was fairly prevalent. It was rationalized on the basis of traditional male and female economic responsibilities outside of the workplace. As society's values have moved away from the traditional roles, so also has the practice diminished, and hopefully will soon be a thing of the past.

The second cause is the "traditional" type of job and traditional type of industry to which entrants to the workforce have aspired. While generalization can be risky, I think it would be accepted that 20 or 30 years ago industries such as primary steel, mining, forestry, auto production and industries with a similar "macho" image had entry predominantly from the male ranks. Women tended to form the majority of entrants to such industries as textiles, light assembly work, food packing, and a variety of personal services. Immigrants of that time could, very generally, be grouped into those possessing professional, managerial, educational, and skill backgrounds corresponding to Canadian business standards, and those whose backgrounds did not. The former were generally from industrialized countries such as the United States and Western Europe. The latter were generally from Southern and Eastern Europe, and more recently, from the Caribbean countries, Asia, and to a lesser extent, Africa.

What the effect of this "traditional" entry pattern is on the 60 per cent syndrome, I do not know, I believe it to be substantial. When one considers that an individual's life in the workforce will range from 40 to 45 years, then probably half of today's workforce is affected by the entry pattern which was society's norm 20 years ago.

The solution to this problem is not easy, and must inevitably be long term. It can affect the entire structure of Canadian industry. There is the ethical question "Should a woman installing printed circuits in a television chassis be paid less than a man assembling wheels on a car?" Here, as individuals, we run into our basic conflict of roles -- as consumers we strive to use the "market"

approach in determining the value to us of the factors of production, including wages. As producers or as members of groups influencing society, we tend to look more to the "social justice" approach in determining the value. When we have been successful in our "social justice" role in removing some of the perceived inequities, do we then assume our consumer role, and make "market" decisions to purchase the Hong Kong made transister radio, or the Taiwan made shirt.

The problem associated with the "social justice" approach is further compounded by the continuing move to international trade liberalization. In the recent Tokyo round of Gatt negotiations, Canada gave up some desirable benefits in return for a level of protection in apparel and shoes - a price we will pay as "market-value" consumers for "social justice" compensation.

The solution to this industry/skill component of the 60 per cent inequality problem, may lie less in the egalitarian approach to reducing industrial and skill differentials, and more in a broadening of the industrial choices and skill choices available to women and minority groups at time of entry. It follows that a prerequisite is a change in the traditional educational patterns of schools and community colleges to prepare women (particularly) for this broader option. I believe substantial change has already occurred in these institutions, but it is completely unrealistic to expect any measurable impact on the 60 per cent syndrome -- until today's pioneer entrants are virtually halfway through their 40-45 year work life.

The third cause which I believe to be significant is hierarchical. Statistics of all sorts have been produced which show that the higher up the management ladder one looks, the greater is the predominance of the "Anglo Saxon type" male, in relation to the sexual and racial proportions of the work force. Unfortunately, organizations which choose to use such acronyms as NOW, leave the impression that the solution is as quick and easy as mixing instant coffee which, by the way, as part of my <u>own</u> job enrichment program, I am studying now to do myself. Perhaps those who advocate a <u>rapid</u> change to a more proportional representation should take a lesson from our unique and recent Canadian experiment. In pursuing the very legitimate social goal of raising Francophone representation in the senior civil service closer to their population proportion, we incurred high cost, achieved low effectiveness and the process involved perceived reverse discrimination on a mammoth scale. Canadian business, in fulfilling its economic role, just does not have the resources to embark on a similar type program. I suspect that Mr. Alexander may agree that neither has the Canadian government.

No! Real progress in this area requires the establishment of <u>realistically</u> set goals in a proper time frame taking into account our need for international competitive economic performance.

"Ends - Seniority, Promotion, Layoffs"

Turning now to what I have classified as the second "End" -- "Seniority, Promotion, Layoffs."

This subject is itself so wide, that I will confine my comments to a comparison of the three conflicting perceptions of Seniority, as it relates to Promotions and Layoffs --

From business - "Our primary objective is economic efficiency. Seniority means nothing. We want to promote the most efficient, and in layoff situations, layoff the least efficient." -- Seniority is a cost!

From employees, particularly as represented by their Unions -- "Our senior colleagues have given you years of service. They should be protected according to the years of their contribution. Business owes them no less than this basic right." Seniority is a protection!

From Human Rights advocates -- "Because of seniority, and the comparatively recent change in the composition of the work force, existing seniority clauses reduce our chances of promotion, and increase our chances of layoff." Seniority is a barrier!

I don't know the answer to these three conflicting views. I can only suggest that you ensure that your answer does not require an economic cost to Canadian business, operating in an international environment, that results in fewer opportunities for promotion, and a greater frequency of layoffs.

Affirmative Action Programs

I have touched briefly on the elements of the desired "Ends" or, "Objectives." I have suggested that these elements may each require a different solution, a different Action Program. Let's take a look then at my perception of Affirmative Action Programs. I will confine myself to what I see as the respective responsibilities of Government, Business, and the Individual. To this, of course, you will add your views on the responsibilities of various groups such as the Trade Union movement, various Canadian Women's organizations, and Canadian equivalents of organizations similar to the NAACP, where it would be presumptuous of me to speak.

I see government's responsibility as primarily one of climate creation. By setting an example in their own hiring and promotional policies; by broad human rights legislation; by continuing to foster social awareness of what Canadian society is all about; by influencing the educational system in the elimination of stereotyping; by providing progress reports based on statistical sampling rather than multitudinous forms. I do not see their role as regulatory, with the establishment of bureaucracies which set quotas, as has become the practice

in the U.S. I quote from the Indianapolis News of March 18, 1978 where the head of the Equal Employment Opportunity Commission states in regard to a new regulatory policy "It is very difficult for a company that did not start hiring yesterday -- literally yesterday -- not to be in violation."

Business has the responsibility for ensuring that the climate within the organization matches society's current standards. Although the future picture will change, we can not alter the fact that in today's work force, men with business and engineering oriented education vastly outnumber women, who in the past leaned toward liberal arts; and, unlike the U.S., our "visible minority" work force is largely an immigrant population from countries with a lower educational standard. Business can ensure however, that these general truths are not used as a screen to bar the qualified individual in the individual hiring or promotion decision. Business and business oriented publications, which are already doing a great deal, should expand their efforts by publishing more on the changing sex and racial mix in business schools; by publishing success stories; by well researched "How To" articles. Throughout all this however, I must re-emphasize that business's primary role is the economic one, and our failure to fulfill that role adequately would be far more catastrophic to society as a whole, than would the occasional slip-up in our social role.

Given that governments create and maintain the desired social climate at the macro level; given that companies do the same at the micro level; how does the individual prepare to take advantage of the opportunities what will be created?

While various groups may help, this preparation, this investment in one's future is obviously an individual responsibility.

Career commitment, relevant education, adequate technical ability, and so on, are obvious requirements at the entry stage and beyond. Studies have proved that for similarly trained people there are no measurable differences either by sex or by race.

I find however, that studies related to women in management, bring out two areas where weaknesses, which are barriers to promotion, still exist. These are (1) the lack of self-confident attitudes, and (2) the inability to achieve a high level of visibility in the organization. Visibility is important in order to reach the management/leadership position. An attitude of self-confidence is necessary to successfully occupy the position. In 1975 Columbia Broadcasting Systems had just completed two years of a program for the advancement of women. Their Vice-President, Corporate Planning, Kathryn Pelgrift said, "It will take time ----- for women to gain the confidence to assert themselves and take advantage of newly opened opportunities." In an AMA survey, a top woman executive stressed: "Women need to develop the kind of assurance and positive self-image that will allow them, and others, to set aside the male/female issue and proceed with the business at hand."

In developing one's own personal Affirmative Action Program, this cultivation of positive self image should be near the top of the list. I might suggest a couple of pointers. Identify models to emulate where possible. Here this evening we have Mr. Alexander and Mrs. Hartmann. Prominent in western society are people like Flora MacDonald, Margaret Thatcher, Andrew Young, Tom Shoyoma, Pauline McGibbon, Beryl Plumptre, Sylvia Ostry, David Suzuki and many others. Their achievements are not the results of quotas, but the result of ability, plus the self-confidence and positive self-image that comes from applying that ability. Identify with them. Their success can be used to reinforce one's own confidence and image. Take advantage of Assertiveness Training Courses, but then apply the knowledge, not only in the workplace, but by supplementing this with experience in lesser risk situations, such as active participation in Credit Unions, School Boards, Ratepayers' Associations, Home and School Associations, local branches of political parties. Aim to become involved in the decision making process in these groups, rather than in the various auxiliary or service affiliates. Carry the experience gained back into the workplace.

Visibility! Promotions go to those who are seen to be promotable. Be seen this way! If, for example, the task at hand involves the compilation of data which suggests a course of action, then add a comment or two to the tabulation. Don't be afraid of non-acceptance. Positive visibility will have been achieved.

In conclusion, I wish to stress once again that business's first and foremost role is the economic one. If it fails in that role, then it fails in every other role. Where society's expectations are consistent with the performance of business's economic role, then there is no problem. Business adapts. When there is inconsistency, then a trade-off becomes necessary -- the economic function is reduced to meet society's new demand, or vice versa. But business is part of its environment. It is a "flow-through" mechanism. So, in this trade-off situation, what society gains in social terms, it pays for in economic terms. This is why I have suggested the "climate creation" approach rather than the regulatory approach, which has a questionable cost/benefit relationship; and why I have suggested greater individual effort in cultivating necessary skills and attributes, adequately supported by government and business. This will minimize the degree to which new social values become diseconomies.

If I may borrow from the sub-title of this conference. Business has been challenged, and is moving positively to meet the challenge. I am now putting out a challenge to individuals to prepare themselves adequately for the opportunities which will be created.

Business will provide these opportunities. By individual preparedness, put us in a position where, economically, we can not afford not to.

ADDRESS

By

Harish C. Jain

McMaster University

"On Increasing the Supply of Women at Corporate Decision Making Levels"

Women have made substantial progress in the past 25 years or so. The Royal Commission on the Status of Women, International Women's Year in 1975, the Status of Women organizations, and the ongoing women's liberation movements have all contributed to changing societal attitudes toward the role and conditions of women in society in general and in the workplace in particular.

Despite this growing awareness of the problems faced by working women and the emphasis placed on the promotion of equality of opportunity between men and women by the human rights and other relevant legislation in Canada, a very real gap exists between the normative intent of these regulatory processes and the actual situation in which women find themselves today. This is especially noticeable with regard to their active participation in the labour market and the occupational positions they hold therein, as well as in its decision-making processes. In practice, it would appear that women's opportunities for participation, both in the labour market and in decision-making bodies, still lag far behind those of men.

In recent years women have been participating in increasing numbers in the labour force and especially in the secondary and tertiary sectors. However, most of them are concentrated in the lower echelons of these sectors, a factor which has not enhanced their decision-making potential. Let me illustrate. Women at present (1979) account for almost 40 per cent of the Canadian labour force but their current share of management and administrative positions is 25 per cent (The Current Industrial Relations Scene in Canada 1979, Grass, 1979). Most of these management positions, however, are at the first-line supervisory and middle-management levels. A majority of all female workers are still concentrated (in 1978) in clerical, sales and service sectors of the economy.

Women's lack of representation at responsible decision-and-policy-making levels is even more clearly illustrated by the fact that of the 13 000 public and private company directorships women hold fewer than 1 per cent of directorships in Canada (compared with 28 per cent in U.S. corporations), (Ferrari, 1977; Peterson, 1977; McCallum, 1979). Similarly, women are not represented on the executive boards of Canadian unions in proportion to their overall union membership; women constituted only about 12 per cent of the executive board members of unions in 1976 even though they constituted about 27 per cent of all union members in that year. Women are not often engaged in bargaining or grievance handling, which incidentally are precisely the areas in which equality issues are brought up.

What, then, can be done to increase women's representation at decision-and-policy-making levels? The answer is not a simple one. Numerous initiatives on both the demand and the supply side of the labour market are required. I would like to concentrate on one area, that is, the education and training of women in business administration at universities in Canada.

This is not to suggest that human rights legislation, in-house training by business and public bodies and education at community colleges do not have a role to play. I am simply confining my remarks to one area which in my opinion can contribute substantially to increasing the representation of women in managerial and administrative categories and thereby help give them a role at corporate decision-making levels.

Recently, there has been a rapid rise in female enrolment in business schools from less than 10 per cent of full-time undergraduates in commerce and business administration in the 1960s to more than one-quarter now (1978-79). At the graduate level, one in four MBA students is a woman, compared with 1 in 20 in the 1960s. (In Ontario alone, between 1972 and 1978, the number of full-time women MBAs grew from 45 to 314 -- a 700 per cent leap). Similar trends are being experienced by business schools in the U.S. A recent survey of 30 U.S. business schools indicates a range of 13 per cent to 30 per cent female student enrolments; like Canada, these schools had experienced within the past several years, a tremendous jump in the number of both female applicants and graduates (Robertson, 1978).[1] My own experience at McMaster bears this out. In 1970, when I joined the faculty of business, it was rare to encounter female students in either the undergraduate commerce or the MBA programs.[2]

There are at least two reasons why rising student enrolments in general and female enrolments in particular are in the national as well as women's interests. First, Canada badly needs more and better decision-makers (Clarkson, 1979). A decade ago, the Economic Council of Canada emphasized the urgency of the need to improve the capabilities of Canadian management. According to the 1971 Census of Canada, for example, 30 per cent of all managers in Canada held university degrees; this level of managerial training had been surpassed in the U.S. more than a decade earlier (Economic Council of Canada, 1977, p. 93). Recent studies suggest there has been little improvement (Von Zur-Muehlen, 1978). Managerial education and training -- a sadly neglected area in Canada compared with the U.S. -- is essential if we are to overcome our problems in terms of productivity and labour relations, research and technological development, export competitiveness, unemployment and growth. Rising female enrolment in business programs will help provide them with valuable skills and participation in decision-and policy-making levels.

Second, the demand for this type of training is not a short term, cyclical development. According to a study by Dr. Von Zur-Muehlen of Statistics Canada, enrolment in business programs is by no means approaching saturation (1978). If business schools can accomodate them, business students will reach 18 per cent of total university enrolment in the 1980s compared with 12 per cent this year (1978-79). This will particularly benefit women who constitute only 25 per cent of the present business school enrolment. According to Dr. Von Zur-Muehlen, the trend of rising female enrolment is expected to continue and may approach their participation rate in the labour force!

What about jobs? The popularity of business education is hardly surprising in view of the deterioration of job opportunities for arts and science graduates. It is one of the few disciplines that leads almost without fail to employment, and at a higher-than-average level of pay. In 1977 and 1978, more than half of the people hired to fill government positions requiring a university degree were graduates of management faculties (Six Background Reports, 1978). Recent reports indicate that business education is one of the few areas in which females have not encountered difficulties in receiving job offers.[3]

I believe that affirmative action programs by the Ontario and the federal governments for their employees and voluntary programs undertaken by companies such as the Royal Bank of Canada, Bell Canada etc. have also helped in gaining employment for female graduates.

While these developments sound optimistic for the future progress of women in policy-and decision-making levels, there are a number of problems which are already restricting and will continue to restrict the enrolment capacity of the schools of business. Since so many prospective students are clamoring for admission to business and commerce, formal and informal quotas have been instituted at most schools. This is because of the low level of support that is provided for business and management training at Canadian universities.

Governments, universities and the business community have shown a sad neglect in this area of education. For instance, recent estimates indicate that on a per capita basis, U.S. universities are turning out about three to four times as many graduates in business administration and commerce as Canadian universities, and Canadian business schools are short on funds compared with other faculties (Economic Council of Canada, 1977; Clarkson, 1979).

For instance, even though 12 per cent of university enrolment is composed of business students in Canada, schools of business employ fewer than 5 per cent of full time university faculty and, on average, receive only 3 to 4 per cent of operating budgets.

Summary

1. Women are not represented in the decision-and policy-making levels of business and government in proportion to their representation in the labour force.

2. One way to increase women's representation at corporate decision-making levels is to increase the proportion of women who receive education and training in business administration at higher educational institutions in Canada.

3. The trend in recent years seems to indicate that more and more female students are enroling in business schools. This is hardly surprising since business education is one of the few areas in which female graduates have not encountered difficulties in receiving job offers.

4. Partly because of their ability to find jobs, the trend of rising female enrolment is expected to continue and perhaps reach or surpass women's proportion in the labor force.

5. However, business schools cannot accommodate the rising enrolment of both male and female students. This is because of the low level of financial support that is provided for business and management training in Canada.

Conclusions

I believe that it is in the national interest as well as that of employers and governments to provide the necessary funding for business school programs.

It is in the national interest to do so because Canada needs more and better managers if we are to overcome our problems in terms of productivity and labour relations, research and technological development, export competitiveness, unemployment and growth.

It is in the employers' interest to support business schools since there is and is expected to be a shortage of qualified managers.[4]

In addition, there are provisions in the Canadian Human Rights Act giving the federal cabinet power to pass regulations whereby any firm seeking a federal government contract, grant or licence must meet federal equal employment opportunity standards. The changes being contemplated in the impending Ontario Human Rights Code for the fall legislature might also require affirmative action programs of government contractors. All provinces, except Alberta, Saskatchewan and Quebec, by the end of 1978, had in place some sort of equal opportunity programs for the Crown employees. The effect of all this legislation is to promote opportunities for hiring, training and promotion of women in both the private and public sectors.

By providing financial assistance to business schools, employers can assure themselves of an adequate supply of qualified women to meet their legal requirements.

I believe it is also in the governments' interest to provide adequate funding to business schools. If the governments expect employers to comply with the human rights legislation and to formulate affirmative action plans by hiring women in proportion to their representation in the labour force, it will evoke charges of reverse discrimination and preferential treatment as has been the case in the U.S. This is because employers may not be able to draw upon an adequate supply of qualified women managers. (Preferential treatment occurs when employers, as government contractors, resort to hiring unqualified women and minorities to meet their quota obligations under affirmative action programs in order not to lose the contract.)

Let me conclude by saying that if you agree with my assumption that business schools can increase the number and quality of women managers, it is imperative that resources be provided so that the business schools can do the job.

Before concluding, let me suggest that while business education might be necessary for females to gain entry in business, it is not by any means sufficient. Counselling concerning career development, socialization in organizational forms and having sponsors or mentors are some of the other necessary ingredients if women are to have access to top management jobs.

Footnotes

1. A 1978 survey by the Princeton, New Jersey based graduate management admission council revealed that 24.1 per cent of all MBA students (in the fall term of 1978-79) were women. The survey was based on responses from 264 schools in the U.S. and Canada.

2. Indeed, in 1973/74 only one out of ten MBAs in our full-time and cooperative program were women and it was not until 1976 that the same proportion (one out of ten) of women graduated as MBAs. In the last couple of years (1977/78, 1978/79) over 25 per cent of our students were women while in the current academic year (1979/80) preliminary figures indicate that 29.6 per cent of the full-time and co-op students are women (while only 13.8 per cent in our part-time MBA program are women this year). Thus, the proportion of females enroled in our MBA program has grown from 10 per cent to 30 per cent at McMaster in the short time span of six years. Similarly, female graduates in the MBA program have gone up three times from more than 5 per cent to 14.4 per cent from May 1975 to May 1979.

3. A pilot survey of some of our female MBA graduates revealed that their perception of discrimination diminishes the longer they work. The survey included 14 female MBAs who graduated from McMaster between 1972-1976. The respondents were asked to indicate whether they experienced any discrimination compared with their male counterparts after the first year of their employment and every year thereafter.

   The respondents felt that their acceptance by their superiors and peers was more now than after the first year of their employment. They also perceived that their chances for promotion increased over time, the longer they acquired work experience. Thus, there is a clear-cut linkage between the intensity of the stereotype and the level of discrimination. Perceived discrimination in compensation, acceptance level and promotion shows a perceptible decline as organizations become accustomed to women fulfilling unaccustomed roles. The survey was conducted in November 1978 as a class project by MBA students Stephen Smith, Paula Hucko, Don Theroux and Grant McNeil.

4. Employers may need to increase their supply of women at all occupational levels out of pure economic necessity. Over the past four decades or so, the female labour force participation rate has significantly increased from 21.8 per cent in 1931 to 46.2 per cent in 1977, while that of males has declined from 87.2 per cent to 79.2 per cent over the same period (Ostry & Zaidi, 1979, p. 33). These trends are expected to continue in the future so that the female labour force will increasingly constitute a critical source of supply.

References

Anderson, R. "Business studies failing to gain proper support," Globe & Mail, July 25, 1979, B-2.

Brown, L. "Women MBAs. A New Elite," Toronto Star.

Clarkson, Max B.E. "A parasitical reliance on imported skills," The Canadian Business Review, Spring 1979, 19-24.

Ferrari, Leslie Ann. Canadian Directorship Practices: A Profile, Conference Board in Canada, Ottawa, August 1977.

Grass, J. "Women and the corporate ladder," Spectator, September 11, 1979, p. 41.

McCallum, P. "Despite women's new inroads in business firms still slow to accept them on boards," Globe & Mail, July 23, 1979, B-1.

Ostry, S. and Zaidi, M. Labour Economics in Canada, MacMillan of Canada, Toronto, 1979.

Peterson, Susan. Canadian Directorship Practices: A Critical Self-Examination, Conference Board in Canada, December 1977.

Robertson, Diana. "Women Business School Academicians," A paper presented at the Academy of Management Conference, August 1978.

Six Background Reports on University Management Education in Canada, Statistics Canada, Ottawa, March 25, 1978.

von Zur-Muehlen, Max. A Review of University Management Education in Canada, Statistics Canada, Ottawa, February 21, 1978.

The Current Industrial Relations Scene in Canada, edited by D. Wood and P. Kumar, Industrial Relations Centre, Queen's University, Kingston, July 1979.

Women in the Labour Force: Facts and Figures, Labour Canada, Ottawa, December 1978.

Women in the Labour Force: Basic Facts, Ontario Ministry of Labour, Women's Bureau, 1979.

PANEL ON EQUAL PAY

Chair: Professor Naresh Agarwal
McMaster University

Panelists: Marnie Clarke
Director, Women's Bureau
Ontario Ministry of Labour

A.E. Richards
Assistant Vice-President, Personnel
Bell Canada

Deirdre Gallagher
United Steelworkers of America

EQUAL PAY FOR WORK OF EQUAL VALUE

By
Naresh C. Agarwal

Pay inequality between men and women has become a matter of considerable social and political concern. Several studies[1] have attempted to measure the extent of pay inequality between the two groups. One such study[2] estimated that in 1961, women were paid less than men ranging from about 8 percentage points in the labourer category to about 35 percentage points in the managerial. The estimates were arrived at allowing for differences between men and women in job levels, hours of work, education and experience. A more recent study[3] while broadly confirming these estimates, shows that pay inequality between men and women has shown no declining trend since 1949. We must also note here that the sex composition of our labour force has significantly changed over the last few decades. In 1951, only 22 per cent of the labour force was female. But by 1978, the percentage had increased to 40, and is expected to be even higher according to the available projections.[4] What these facts imply is that over the years, an increasing proportion of our labour force has become exposed to the problem of unequal pay; the proportion would continue to rise unless the problem is attacked systematically and urgently.

For this reason, the present conference on Race and Sex Equality in the Workplace and particularly this session on equal pay are very timely. Three distinguished representatives, one each from the government, industry and labour union were invited to contribute papers on equal pay. They are Ms. Marnie Clarke, Director of the Women's Bureau, Ontario Ministry of Labour; Mr. A.E. Richards, Vice-President (Personnel), Bell Canada; and Ms. Deirdre Gallagher, Staff Representative, United Steel Workers of America. Before discussing these papers, let me make a few preliminary remarks.

What is 'just and fair' pay? What is the best mechanism to establish such pay? These and other questions concerning justice in compensation are by no means new. They must date back to the time when the employment relationship first emerged. However, the answers to these questions have significantly changed through time reflecting the contemporary economic, social and political environments. In the 17th and early 18th centuries, the prevailing doctrine was that each worker should be kept and supported in the class into which he/she was born. Accordingly, just wages were defined as per the forms of the traditional social class structure, and were systematically enforced by the state to maintain the status quo.

Following the publication of Adam Smith's Wealth of Nations in 1976, the thinking on wages began to change. Adam Smith advocated that the market forces of demand and supply were preferable to custom and regulation in determining wages. Implicit in this advocacy was the notion that the market-determined wages also constituted the true and just price of labour. This notion was later on developed more fully by

the marginalists. Assuming competitive markets and long run general equilibrium, they argued that the market forces would establish a wage rate that was equal to labour's contribution to output as measured by its marginal productivity. If the wage rate was below the marginal productivity of labour, employers would find it profitable to hire additional workers. This would result in excess demand for labour, increased competition among employers to find workers and eventually higher wages. Wage rates above the marginal productivity of labour would produce exactly the opposite effect - excess supply of labour, increased competition among workers to find jobs and eventually lower wages. Thus competitive market forces in the long run would ensure equality between the wage rate and the marginal productivity of labour.

The doctrine that the market forces could be depended upon to determine wage rates that were also fair and equitable continued to dominate until the early part of the present century. Since then, the emergence of powerful industrial groups and labour unions along with other institutional factors have caused labour markets to diverge from the competitive model of Adam Smith and the marginalists. Such divergence has been clearly recognized in compensation theory as well as practice. In theory, it is reflected in the development of the internal labour market concept, and in practice, it is in the use of job evaluation.

An internal labour market lies within a firm. It can be defined as a set of administrative rules and policies to determine wages (and allocate labour). While these rules are developed by each firm to suit its own specific situation they are not entirely free from the influence of the external labour market. Such influence is particularly felt at the entry level jobs which are filled by the firms from the external market. Job evaluation operationalizes the concept of internal labour market at the applied level. Job evaluation is a systematic process of assessing the value of a job within a firm relative to other jobs in that firm. Job values are assessed based on compensable factors such as skills, responsibility, effort and working conditions. The decision concerning the compensable factors to be used and their relative weights can be made by the management either unilaterally or jointly with the employee representatives. It is important to note here that job evaluation establishes a relative structure of job values but not of wage rates. In order to convert job values into wage rates, the following steps are involved: a) selection of certain key jobs (typically entry level jobs) from the job hierarchy established through job evaluation, b) determining wage rates for key jobs through market wage surveys and/or collective bargaining and c) deriving wage rates for the remaining jobs based on their proportional value relationships to key jobs.

Against this background, let me comment on the equal pay for work of equal value principle and the issues it raises concerning the process of wage determination. The equal value principle was recently embodied in legislation at the federal level - section 11 of the Canadian Human Rights Act passed in 1977. The equal value principle

allows comparisons of job values among similar as well as dissimilar jobs. The previous federal legislation called for equal pay for the same or similar work. It required that men and women be employed in the same job within the same establishment in order for pay comparisons to be made. Thus, the previous legislation was inapplicable to all those cases where men and women held even slightly dissimilar jobs.

While the rationale underlying the equal value principle is obvious, the answers to the operational issues involved are not. Some of the operational issues are as follows:

1. The equal value approach requires job evaluation to measure and compare job values. As pointed out above, the results of job evaluation are directly dependent upon the compensable factors used and their relative weights. Whether or not such results are equitable depends upon the quality of the decisions concerning compensable factors. The question then is who makes such decisions and how?

2. Not only does the equal value principle require the use of job evaluation, it imposes an additional constraint on it. The equal value principle necessitates a job evaluation scheme which can permit comparisons among similar as well as dissimilar jobs. The question is: can a single job evaluation scheme be developed which is general enough to encompass all the different jobs within a firm and yet is specific enough to consider the unique characteristics of these jobs?

3. Job evaluation can establish a hierarchy of jobs based on their relative value, but it cannot price this hierarchy in dollar terms. Put differently, job evaluation can identify the jobs which are of equal value and as such should be paid equally. But it cannot specify what that pay should be. As pointed out earlier, the market mechanism and/or collective bargaining have been traditionally employed for this purpose. The federal equal value legislation however appears to reject them both. The question then is: what alternative mechanism can be used to price the job hierarchy established through job evaluation?

The above issues need to be discussed and resolved if the equal value legislation is to become truly effective in establishing equal pay.

Let me now briefly comment on the three papers for our session today. The first paper by Ms. Clarke from the Ontario Ministry of Labour reviews the existing equal pay legislation in Ontario. The legislation calls for equal pay for men and women performing substantially the same kind of work performed in the

same establishment. Ms. Clarke points out that the enforcement of the existing legislation could be tightened by a) redefining establishment to include all enterprises of one employer, b) a consecutive employment clause preventing a wage rate from being lowered when a woman replaces a man in an job other things being equal, and c) prohibition of pay reductions because the employer has restricted work performed to the employees of the same sex to avoid application of the Act. Ms. Clarke recognizes that the equal value concept allows for comparisons among dissimilar jobs held by men and women. But she stops short of endorsing it for adoption in Ontario at the present time.

The second paper by Mr. Richards from Bell Canada deals with some of the problems employers face in applying the equal value concept. Mr. Richards explains how wage rates are determined in Bell Canada. For management jobs, a job evaluation plan is used to establish the job hierarchy. The hierarchy is then priced based on the market rates for selected key jobs. For clerical jobs, a similar process is followed except that the wage rates for the key jobs are set through collective bargaining. The wage rates for technical and operating jobs are not affected by job evaluation. These rates are set at the bargaining table. Mr. Richards argues that the equal value legislation over-emphasizes the role of job evaluation in setting pay rates. Specifically, he doubts whether one job evaluation scheme can be developed to encompass the entire range of jobs in Bell Canada. Mr. Richards also points out that employers are not clear what role the market and/or collective bargaining would play under the equal value legislation.

The third paper by Ms. Gallagher from the United Steel Workers of America compares the provincial (Ontario) and the federal equal pay legislation. She appears to favour the federal legislation because it allows comparisons among dissimilar jobs held by men and women. In this regard she cites the example of a comparison of a bus driver (male) with a secretary (female) both employed by the same bus company. Ms. Gallagher explains how her union has attempted to establish equal pay for its members. Under its Co-operative Wage Study (CWS) scheme, the union has developed two <u>separate</u> job evaluation plans - one for the white collar jobs and the other for the blue collar (production and maintenance) jobs. The two plans however, have not been interrelated, that is, under the CWS scheme, clerical jobs cannot be compared with production jobs. Ms. Gallagher justifies that by saying that "this would be comparing apples and oranges." If that is so, it is not clear where Ms. Gallagher stands in relation to the equal value concept. Conceptually, she appears to favour it. But operationally she seems to advocate its limited application.

Taking an overall view, a high degree of commonality can be found among the three papers despite the differing affiliations of their writers. At the conceptual level, they all agree on the principle of equal pay for work of equal value. At the operational level, they all indicate, implicity or explicity, that problems lie ahead.

Footnotes

1. For a review of these studies, see: N.C. Agarwal and H.C. Jain, "Pay Discrimination Against Women in Canada: Issues and Policies," International Labour Review, Volume 117, No. 2, March-April 1978.

2. S. Ostry: The Female Worker in Canada. Dominion Bureau of Statistics, Ottawa, 1968.

3. M. Gunderson: "Time Pattern of Male-Female Wage Differentials: Ontario 1946-1971," Relations Industrielles, Vol. 31, No. 1, 1976.

4. T.J. Samuel and L. Motuz: Labour Force Projections to 2001. Strategic Planning and Research Division, Department of Manpower and Immigration, Ottawa, 1973.

5. For a detailed historical treatment of the subject, see N. Arnold Tolles: Origins of Modern Wage Theories. Prentice-Hall Inc., Englewood Cliffs, New Jersey, 1964.

EQUAL PAY LEGISLATION

By

Marnie Clarke

Equal pay legislation has been the major response of most jurisdictions to the pay inequities faced by women in the labour force throughout the world. Although variations of equal pay legislation have been in force for many years in some jurisdictions, pay differentials between men and women continue to exist. Even allowing for human capital differences such as age, job levels and hours of work, independent empirical studies place the wage gap at 10 - 25 per cent.[1] A 1977 survey of wage rates for office occupations in Toronto covering establishments with 20 or more employees indicate a wage gap, though smaller, between specific occupational categories. Thus, female accounting clerks, senior, are paid 82.6 per cent of male accounting clerks, senior; female order clerks are paid 76.1 per cent of male order clerks.[2] Both in narrow and broad occupational categories there are wage differentials which can only be attributed to sex.

The equal pay section of The Employment Standards Act in Ontario states:

> No employer or person acting on behalf of an employer shall differentiate between his male and female employees by paying a female employee at a rate of pay less than the rate of pay paid to a male employee, or vice versa, for substantially the same kind of work performed in the same establishment, the performance of which requires substantially the same skill, effort and responsibility and which is performed under similar working conditions ....

Present equal pay legislation could be tightened to respond to present enforcement problems. A redefinition of "establishment" could broaden coverage to include all enterprises of one employer.

---

1 i. S. Ostry, The Female Worker in Canada, Statistics Canada, 1968.

ii. M. Gunderson, "Male-Female Wage Differentials and the Impact of Equal Pay Legislation." Review of Economics and Statistics, November 1975.

iii. R.A. Holmes, "Male-Female Earning Differentials in Canada." Simon Fraser University, Discussion Paper, 1974.

2 Women's Bureau, Ontario Ministry of Labour, Women in the Labour Force, "Basic Facts" 1979.

A "consecutive employment" clause would simplify enforcement in a case where a woman is hired, replacing a man, has comparable experience and assumes the same job responsibility, but is not paid accordingly.

Further changes could include the prohibition of pay reductions because the employer has restricted work performed to employees of the same sex to avoid application of the Act.

As with all labour standards such as vacation pay, overtime and termination pay, which are established to maintain basic rights for employees, the good employers attempt to reach these standards and beyond, but as with all legislation, there are violations and only some violators are identified and required to pay. As with those who practice tax evasion or traffic offences, many are not apprehended and a good deal of effort is expended in an attempt to maintain the power of the law.

Legislation against racial, religious, age and sex discrimination is particularly difficult to implement because discriminatory practices can be both subtle and in some cases, unrecognized by the perpetrator. Women's Bureaux, Human Rights Commissions and other organizations must therefore encourage a recognition of unfair practices based on outmoded prejudicial attitudes and attempt to educate individuals and groups to recognize the dignity and worth of every human being. Law alone cannot solve the dilemma of ancient prejudices or the fear of the stranger which seems a part of all cultures. Business, industry, educational institutions, governments and unions share the responsibility for positive action to encourage change.

Although equal pay and equal opportunity in the work force are essential for any progress in equality between men and women, and should in my opinion, be considered together, I have been asked to focus my comments on the issue of equal pay.

In 1978, 52 per cent of all women in Ontario were in the labour force, a sizable increase since 1968, when only 40 per cent of Ontario women were working outside the home. However, the occupational range has not changed. The majority of women, 62.3 per cent in 1968, continue to be employed in clerical, sales and service jobs, often sex-segregated, which prevents a comparison between men and women. In contrast, it must be noted that no more than 11.5 per cent of men are employed in any one occupation.

Therefore, the pressure for legislative change in this area has been to move beyond equal pay for "substantially similar" work to equal pay for work of equal value. Such legislation is intended to compare jobs of an unlike nature, within an establishment, on the basis of a composite of factors.

This concept has been enacted in Quebec and in the federal Human Rights Act, 1977, Section 11. It is too soon to determine the efficacy of the new legislation in reducing the male/female wage differentials, since there have been no settlements as yet. The conciliatory model which the federal Human Rights Commission has adopted attempts to balance the just claims of the employees with the employers' financial capacity to pay. That is, an employer whose system of job evaluation and/or salary administration was deemed by the Commission to result in females receiving less pay according to their value to the corporation, in relationship to male employees, could be given a period of time to adjust the company's pay systems in compliance with the Commission's ruling. Thus, equal value legislation federally does not represent an employment standard which involves firm enforcement including back pay and immediate compliance.

As I understand the federal plan, it allows for a pragmatic approach to equal pay complaints and considers the economic viability of corporations since the loss of jobs caused by the demise of a marginal employer, unable to meet immediate demands for money, would certainly be non-productive.

Since the federal model only applies to approximately 10 per cent of Ontario employees, it provides a microcosm, a demonstration model, which can be monitored for its effectiveness in achieving more equitable pay scales for women.

Job evaluation is an essential component of any effort to improve the remuneration of women. The Women's Bureau, with the advice of experienced job analysts from both employers and unions, is developing a set of guidelines to assist employers in examining their own methods of job evaluation for possible sex bias. I hope that the guidelines will help employers and unions detect possible problem areas and develop procedures of job analysis which will move job evaluation schemes toward a gender-free assessment of jobs.

The British Equal Pay Act (1970, effective 1975) recognizes the difficulty presented by a lack of formal job evaluation systems in many enterprises. The British legislation provides a two-tiered approach. All women have the right to equal pay with men employed in like work, but in addition, the Act provides for equal pay to men and women employed in work rated as equivalent by a job evaluation scheme. There is, however, no obligation for a company to introduce such a scheme. This indicates the overriding need for greater knowledge in the areas of job analysis and salary administration and an educational program directed toward the encouragement of sound, unbiased job evaluation systems.

The National Academy of Science in the United States, funded by the Equal Employment Opportunity Commission, is in the process of completing a massive study of job evaluation schemes in present use and analysing them for built-in biases against women. The final report should be completed by December of this year and will, it is hoped,

provide a more adequate research base in this area than presently exists. The staff of the Women's Bureau Affirmative Action Consulting Service should benefit from this research as it seeks to assist those employers who are voluntarily attempting to improve the status of women within their organizations.

It is important to emphasize that legislation, and in particular, equal value legislation is not in any way a panacea for the numerous problems facing women in the labour force today. The narrow occupational range, lack of opportunities to enter semi-skilled and skilled trades or to be promoted within organizations, sexual harassment on the job, pressures against the mature employee, unemployment, are only some of the issues which must be addressed. Unfounded myths which subtly, and sometimes not so subtly, work against equal opportunity and fair remuneration for women must be fought by public education programs in schools and all institutions. Through the collective bargaining process, legislation and the persistence of those organizations and individuals who are aware of the ultimate worth to society in utilizing all our human resources, we can begin to meet the very serious challenges facing this country in the latter half of the 20th century.

EQUAL VALUE

By
A.E. Richards

Equal value is an important subject, and a lot has been written about it since its inclusion in the Human Rights Act over a year ago. It's a simple concept to understand - and it's an attractive one - as long as it's kept in general terms. The difficulty lies in application, because it challenges some other equally simple concepts that are well entrenched in the way we live and work. So it's little wonder that it's a hot potato.

As you know, equal pay legislation isn't new, it's been on the books for years. The significant change that comes with equal pay for work of equal value, is that what is done is not the issue. Dissimilar jobs must be paid at an equal rate if they involve equal skill, effort and responsibility. What is intended is that "value" be determined by a process of job evaluation, and not as heretofore by market forces or by collective bargaining - or as some would have it, by chauvinistic whim.

A core question is this: Is job evaluation a viable tool to establish wage levels? Generally speaking, it's used to establish relationships between jobs having similar characteristics. It has not been used to establish pay levels. Therein lies the dilemma.

In Bell Canada, we use two job evaluation plans - one to evaluate management jobs, and one to evaluate clerical jobs.

The management plan is used to evaluate jobs held by about 14 000 managers, on 10 discrete wage levels. It was designed specifically for management, and specifically for the telecommunications industry. It measures nine factors:

- mental development
- experience
- judgment
- difficulty of decisions
- diversity of subjects to be considered in decision-making
- inventiveness
- freedom to act
- magnitude of consequences of decisions
- supervision

The mechanics of the plan are straightforward: an incumbent writes a job description, reviews it with the boss to get his or her approval to make sure it's an accurate reflection of the job, and then submits it to a rating committee. There are three of these committees in the Company; one in Ontario, one in Quebec, and one in H.Q. - with interlocking membership to assure as much uniformity as possible. Committees are composed of line and staff managers from all major

disciplines who have been given training and have considerable experience in job evaluation. But you know, no matter how scientific we might like to think it is, job evaluation boils down to a set of highly subjective judgments. So equity requires both collective judgment, and continuity in this judgment.

The clerical plan applies also to about 14 000 employees. The concept is the same, but the factors are a bit different. I'm not going to take time to go into detail - if you wish I will later. I'd like to make two points though:

1) The factors used in most plans are fairly common and probably can be classified under the main headings of Skill, Effort and Responsibility without too much difficulty.

2) The second point is that we use job evaluation to establish relationships between jobs in the management and clerical families, but in both cases we rely heavily on the wages paid in the community to establish actual wage levels. We have management and clerical wage surveys. In the latter case we survey about 1 800 companies in 56 locations in Ontario and Quebec - and we do this each year. We use the results to help establish a fair wage offer as a basis for bargaining with our clerical union.

So relationships can be established by job evaluation at least within families, but actual wage levels are established by the market and by bargaining, and these are interrelated.

The wage structure for technicians and operators are not affected by job evaluation. The rates are simply set at the bargaining table, once again using wage surveys as a basis.

We have had Job Evaluation plans in existence for some time. So we are comfortable with it as a concept, and we think we're fairly skilled at application.

The major problem though is not the mechanical process; it is simply that, in reality, wage levels are not determined by job evaluation, but by the market place and collective bargaining. To suddenly negate these functions, or even to refuse to face squarely the issues prompted by the unique provision in this law, has very serious consequences.

The conflict between the equal value concept and collective bargaining is obvious. But let me give you another problem area that we face which the job evaluation process doesn't appear to address:

- the market for talent has fluctuated over the years. From time to time certain skills are in very high demand. Under these conditions, people are willing to pay more for these

skills in order to attract them. If we don't respond appropriately, we won't attract the quality people we need, and on top of that, our competition steals our own employees who have received Bell training and job experience.

So the requirement to compete for talent is very important to us -- and sometimes the job evaluation process isn't sensitive to this requirement.

There are also internal placement problems that we face when we're forced to adhere to the outcome of job evaluation. For instance, some staff jobs evaluate lower than the line jobs they serve. Yet the expertise to do the staff job is obtained by doing the line job. Green circling is against the law. Employees rarely elect to take a salary cut. Once again, we may have arbitrarily decided to pay the staff job more to get the required skills, rather than to fit the job evaluation bank.

These problems are a concern to us if we have to justify our decisions, as a result of an equal pay charge, when the major reason for a wage differential is not sex but it is also not a "reasonable factor." Yet it can be a long leap of logic to decide that wages established by supply and demand or collective bargaining are unreasonable and therefore, sexist.

Bell Canada is a holding company - we have 70 odd subsidiaries. But our main business is telephone service in Ontario and Quebec. Bell Canada has about 54 000 people, 51 per cent of whom are female. The lower paying jobs are filled primarily by women; the higher paying jobs primarily by men. We have analyzed this situation in many ways, and here are some things we find:

1. The factors we apply in the evaluation of a job are neutral as to sex;

2. The job titles are neutral in the main (though we have some trouble with the title "Foreman");

3. Education and experience wage credits are valid job-related criteria. Furthermore, they are applied consistently to all employees.

Why then the pay differential between men and women? It could be that market forces and collective bargaining suffer from sex stereotyping as has been suggested. However, where we have been successful in moving women into non-traditional jobs (for example, to Marketing and computer specialist jobs) wages have not dropped. Market forces still operate on a supply and demand basis irrespective of the sex of the job holder.

There is an undeniable relationship among these three determinates of wage level in our economy:

- job evaluation
- market forces
- and collective bargaining

And to favour the first exclusively poses problems we don't know how to solve. Matter of fact, we see a head-on collision between government agencies whose missions are to guide and regulate business, because some of those missions appear very clearly to be in conflict.

A couple of examples:

1. We are encouraged and helped by the Department of Industry Trade and Commerce to be successful in securing contracts off-shore, in countries which have different laws and customs, some of which place restrictions on the hiring of women.

   - At the same time, we are told by the Canadian Human Rights Commission that we discriminate against women because of those contracts.

2. Another: we are told by the Department of Labour that we must bargain in good faith with our unions - and we want to.

   - yet we are told by the Commission that the only legitimate determinant of value is neither the market place nor collective bargaining, but rather job evaluation.

When this law was being considered, Bell and a number of other companies were asked our opinions about it. Our reply was a consensus - we all expressed serious concern about the proposed law because of its implications and application. Now this would be interpreted by some as an indication that the private sector is irresponsible and even antisocial. But I don't believe that's so. So I've asked myself - if the concept is acceptable, what dont't you like about it. Well, I think partly it's this:

Bell is a monopoly in most of its service areas. For that reason, we need regulation, and we expect it. But the <u>degree</u> of regulation has grown and grown, until now we have hundreds of people doing nothing but responding to regulation in its various forms - preparing and conducting rate cases obviously, but also answering hosts of questions about all aspects of our operation on a continuing basis.

The problem is - I don't think we are a better telephone company for it. I don't think we serve our customers better as a result of increased regulation, or cheaper, than we did 15 years ago. We serve better in some ways, but that's because of improved technology, not regulation.

And I think what bothers me most about Section 11 of the Act is that it has the potential at least for significant increase in regulation by the State.

I hope I don't sound too negative. Of course we'll work with government and others to find ways to apply this law with equity - or to modify it if it needs it. And of course we want to make the best use of our human resources - that's in our mutual best interest. But I think we'll do it better on our own, with a nudge here and there, rather than a shove.

Herbert Spencer was a 19th century English philosopher, and he made a comment that I think is appropriate: "Absolute morality is the regulation of conduct in such a way that pain shall not be inflicted."

Maybe all change involves pain. But I have some feeling that strict application of this law would involve major and very fast change, and at a price I'm not sure Canada as a whole is willing to pay.

As I said, I don't know the answers, but until we do, I think we should proceed with sensitivity and great caution.

EQUAL PAY AND JOB EVALUATION

By
Deirdre Gallagher

What is the worth of a woman?

If present wage levels are any indication, a woman is worth about half as much as a man. Wage averages show that women make about 57 per cent of men's wages and the gap is widening.

There are basically two reasons for this. First, women are denied access to jobs traditionally performed by men or denied promotion to a higher pay strata, and are not encouraged to seek professional or technical training for these better paying jobs.

Secondly, the work women do is under-valued and underpaid. This is not only because women perform less skilled work but also because women as a sex are less valued and their work, the work they are associated with, is consequently demeaned.

Business profits from this situation. Business profits from the deep-seated disrespect for women's worth. It's profitable to pay women less. One economist has estimated that women were underpaid to the tune of $3 billion in one year in Ontario alone. That's a lot of disrespect.

Most of us would agree that this is wrong. But what do we do about it. Two basic techniques have developed to equalize women's position in the work force.

1. Affirmative action - allows women access to jobs they have been excluded from.

2. Equal pay for work of equal value.

The latter concept means that different jobs requiring equivalent skill, effort and responsibility could be compared.

The problem is how do you bring this about. According to a study by the Canadian Labour Congress the legislation dealing with equal pay in all provinces, except Quebec, carries with it a very narrow definition, which essentially requires that in order for the pay to be the same, the work be "the same or substantially the same." With the advent of the Canadian Human Rights Act in March 1978, this concept was broadened, to follow that in the International Labour Organization of the United Nations Convention 100, which calls for equal pay for work of equal value. Quebec is also interpreting its legislation in the broader way.

Each province in Canada and the federal Government have forms of legislation which supposedly offer various levels of protection for female workers from being discriminated against in terms of pay.

The range of legislation varies from the New Brunswick Human Rights Code which states:

> Section 3(1) No employer, employers' organization or other person acting on behalf of an employer shall;
>
> ....
>
> (b) discriminate against any person in respect of employment or any term or condition of employment, because of race, colour, religion, national origin, ancestry place of origin, age, physical disability, marital status or sex.

to the federal Government Human Rights Act which states:

> Section 11(1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.

The differences in legislation are severe and most other provinces, except Quebec, which is similar to the federal Act, only refer to equal pay for equal work or possibly "same or substantially the same work."

In general then the law has a narrow definition of equal pay. The concept of equal pay for work of equal value is designed to broaden the definition. It means that jobs no longer have to be the same, but have to be measured in terms of equal value. Thus to use the CLC example, you would be asked to compare not just two bus drivers, one male and one female and determine whether they were doing the same work, but you might be asked to compare the bus driver, male, with the secretary for the bus company, female, on the basis of their skill, effort, responsibility and working conditions to ensure equal pay for work of equal value. Thus the problem is in establishing what is equal value.

There are a number of methods that have been developed to do this. In the Steelworkers we use a job evaluation system called Co-operative Wage Study. It has had the effect of providing equal pay for work of equal value.

For example in one plant CWS upgraded the women workers. They all worked in one area of the plant and were getting "women's" wages. The results of job evaluation showed that they had been substantially underpaid.

When it came time to vote, though, the women all voted against it. When asked why, they said if they got equal pay the company would hire men in their place. They were, of course, assured that they had job security and the program went ahead. But this is another example of how women understand that they are only valued by the employer if he can pay them less.

The basic principle behind job evaluation is that it evaluates the job not the worker. And using this principle it has brought some justice and order to the wage system.

But there are limitations in any evaluation system. We can't hope to have a technical system which is better than the humans who designed it.

While CWS has brought about equal pay for work of equal value in the production and maintenance units and equal pay for work of equal value in the white collar units, they have not been cross-compared. This would be like comparing apples with oranges. It wouldn't benefit women workers. But the base rate among office worker members of the Steelworkers is 90¢ an hour less than that in the production units. According to experienced negotiators the reasons for this are political and not due to any technical system.

A job evaluation system cannot force the bargaining unit to make a priority of issues which are important to women. The only areas in the Steelworkers where there is a common base rate between offices and plant is in single-industry towns, small communities. There the men decided (since they are a majority of the bargaining unit) to give priority to upping the base rate among the white collar workers (mostly female). In small communities people know one another and perhaps it is easier to overcome the traditional issues that divide working people. Perhaps a recognition of each other's worth comes from knowing one another. In some small communities men and women do have equal pay for work of equal value, throughout production and white collar work.

Ultimately behind so-called technical questions are political and moral issues.

Unions will have to give priority at the bargaining table to demands for equality and to use their power to get it.

Governments have to decide that they are sincere about equality, that equality is more than hollow easy phrases, more than vote winning political rhetoric. In Ontario that means enforcement of existing equal pay legislation and enactment of equal value legislation, and an effective affirmative action program. Governments by themselves cannot overcome the historic inequities but they can and should give leadership. The problems are not so difficult to recognize. The government has commissioned many studies, but to find the will and commitment to act - that seems to be very difficult for this Ontario government.

Corporations have to realize that they cannot expect women to provide them windfall profits any longer. The truth is that there are no corporations that have whole-heartedly integrated women into their enterprises. There are endless rationalizations made for this shoddy record:

- there are no washroom facilities

- getting pregnant is seen as a major disability rather than as a natural human activity, and it is held against women

- women are unreliable

- women get sick too much

- can't handle responsibility like men because of the cycles of the moon

Ridiculous and primitive prejudices about women abound even among those committed to "scientific" management.

Job evaluation is merely a technique. Equal pay for work of equal value is a principle that goes to the heart of the issue of worth. The struggle for equality is the cause behind it. Let's not lose sight of the underlying moral and political issues as we strive to find the means to equalize the relations between the sexes.

PANEL ON AFFIRMATIVE ACTION

Chair: Gérard Docquier
National Director
United Steelworkers of America

Panelists: Professor Walter Tarnopolsky
Commissioner, Canadian Human Rights Commission

Peter Tucker
Employee Relations Manager
Royal Bank of Canada

Alice Carson
British Columbia Government Employees Union

AFFIRMATIVE ACTION PROGRAMS

By
Gérard Docquier

The conference today is on "Race and Sexism in the Workplace." I appreciate the invitation to speak on this topic and chair this panel on affirmative action because these issues are something I have had first hand experience with.

I was an immigrant from Belgium. I remember my first job where the foreman continually harrassed me and warned me that when layoffs came I'd be the first to go because I was an immigrant. Immigrants were often the first laid off and because of that they didn't have much chance for advancement or security.

In this plant there were 200 employees. Only one spoke English, the rest were Francophone including the owner of the plant but all business was conducted in English. Our union representative was forced to negotiate in English.

It is because of this experience that I am particularly concerned about the issues we are discussing today. I want to give two examples of the necessity for affirmative action in female and native employment to begin our discussion.

Women face two main problems in the work force: they are underpaid for the work they are doing and they lack opportunity to do a greater variety of jobs where the earnings would be higher. Government legislation has not touched this issue.

The Steelworkers union represents 180 000 workers in Canada. Of these, about 15 per cent are women. They work mostly in offices, but some work in small manufacturing plants in what are often called low-wage ghettos.

The big employers where unions have existed for years, where there are decent wages and benefits, do not hire women. The Steel Co. of Canada in Hamilton has hired almost no women since the war. They have a few women concentrated in one area of the plant. Stelco has hundreds of applications on file from qualified women workers, but they refuse to hire them in non-office jobs.

Stelco gives as an excuse for not hiring women that they don't have facilities in the plant to accommodate female employees. Yet during the Second World War large numbers of women worked there, and facilities were provided. When women workers are needed, the companies find ways to accommodate them.

In Sudbury, during International Women's Year in 1975, Inco hired about 300 women. Then came the massive layoffs. Women were new to the work force, had little seniority, so almost all were laid off. Women suffer because of a long history of discrimination in hiring.

There is also discrimination in promotions. One Steelworker in Local 6500 who applied for a job she was qualified for, was rejected because it didn't have washroom facilities for her in that area of the plant. The union filed a grievance and won. The company is building the washrooms, and she'll get her job.

Affirmative action means developing programs that help women get hired in the male job ghettos and get promoted out of female job ghettos. This requires the government to insist in law that women be hired in jobs they are qualified for. Now all government affirmative action programs are voluntary and therefore ineffective -- except in the province of Saskatchewan, a point I will return to.

Women members in our union work in a great variety of occupations. In B.C. they work in the mines, they drive the gigantic haulage trucks carrying ore. They are blasters. In Ontario, however, women are not allowed to work underground. The law prevents it. Bill 70, which is the occupational health and safety bill coming into law on October 1, finally removes this discriminatory regulation.

Affirmative action is especially necessary given the structure of the Canadian economy. We are a resource-based economy and with the economic woes of the last few years, we have seen the areas where women are traditionally employed suffer especially from layoffs -- small manufacturing, textiles, white-collar jobs. Women's unemployment rates are much higher than those of men as a result.

Especially in a single industry community, if women do not have equal access to the one industry in town they will not work at all. Many women are solely responsible for raising their children, and they need to be able to work to support them.

I am convinced that affirmative action is urgently required. Mary Eady of the Women's Bureau of the Canadian Labour Congress had said why, in this terse quotation I want to read to you:

> Almost every other woman in Canada between the ages of 15 and 65 is in some form of paid employment. Their wages, however, are on an average only 53 per cent of men's for full-year, full-time work. The wage gap is widening. Thus you can see that women are not paid on the basis of equal pay for work of <u>equal value</u>. In fact, only with a union contract are they even assured of equal pay for <u>equal work</u>.
>
> Where women form the overwhelming majority in an occupation, the pay tends to be very low for the skills they bring to their jobs. It is not because the work isn't essential or necessary. Often in professional categories, with the same qualifications as men, pay for women tends to be lower. They are offered less and accept less.

> Women are beginning to wake up in terms of just how much political decisions by government affect their daily lives. While they are getting only 53 per cent of the earnings men get, they don't pay 53 per cent of sky-rocketing prices. Lack of equality at the work place costs women a great deal of money.

Affirmative action must go hand in hand with equal pay for work of equal value. The Ontario government has refused to enact such legislation. Right now there is a private member's bill introduced by Ted Bounsell of the NDP that is in committee.

If enough public pressure is placed on the government, there may be a second reading. Equal value legislation would mean that women would be properly valued for the work they do. There is no reason a nursing assistant who is female should make much less money than a male orderly.

The Canadian Union of Public Employees fought this through their collective agreements and won. Even though the jobs were not exactly the same (which is what the present legislation requires in discrimination cases), they were ruled to be of equivalent value.

The Co-operative Wage Study, which our union pioneered, has paid off for women. This makes sure women get the wages they deserve relative to other jobs in the same plant, office or industry. It is a job evaluation program that evaluates the worth of the job, not the worker. This is an important concept because historically women have been underpaid because they are women not because of the work they do.

Properly valuing the work female workers perform would go a long way to ending job ghettos. Women must also have affirmative action to allow them to enter work areas that they have previously been excluded from. But if so-called female work were properly valued, if they received decent remuneration for their work, then the basis for the sex division in the work force would be eradicated.

Women in many cases have been afraid to press for equal pay. In Stelco, for example, our union implemented a Co-operative Wage Study two decades ago. The women workers stood to gain a great deal because the job evaluation program revealed that their work was greatly undervalued. At a union meeting at that time, held to approve the program, all the women voted against the settlement. When asked why, since they would have gained so much, they said they thought Stelco would fire them and hire men if they got "men's wages." The union explained that they had job protection and would not lose their jobs. And the program did go ahead, and these women now receive equal pay for their work.

At Val Cartier in Quebec there are a thousand workers of which three to four hundred are women. Again when CWS was bargained the women voted against it even though they would gain by it. It was fear that prevented them from accepting what they rightly deserved.

Employers attitudes have got to change. There's just not much the union can do all alone to make employers hire women. We can't negotiate for people who aren't yet employees. And some employers will do anything it seems to avoid hiring women.

Employers still are sending abroad for skilled tradesmen, yet women have a hard time getting the training they need. With high unemployment, there is no excuse for lack of retraining. Men suffer too, but there are particular impediments for women. If you're a secretary but can't get work in that occupation, you will not likely be admitted to a retraining program because you're considered already to be a "skilled" worker.

There are also discriminatory aspects of the retraining programs related to marital status. If your husband is working, you will not get the same financial support in training as a man.

There is one interesting exception in Canada. In Saskatchewan the government is requiring that Indians get hiring preference in the uranium mining industry. Premier Allan Blakeney opened the door to northern jobs last year by insisting that Amok Ltd., a French consortium now preparing an open-pit uranium mine at Cluff Lake, as a condition of its mining lease would have to hire 50 per cent of its employees among northerners by 1982. "Translated," said Blakeney, "that means Indians and Metis people."

The hiring program has also been combined with hours-of-work schemes intended to allow native people to maintain their traditional way of life. With the approval of the federal Department of Labour, Gulf Minerals two years ago established at its northern Saskatchewan uranium mine a workweek of seven 11-hour days, followed by a trip home for seven days so that Indians will be able to combine work in the mines with hunting and fishing.

These kinds of programs are necessary to successfully integrate Indians into the work force. The Saskatchewan government should be commended for its innovative program. This policy pioneered by the Saskatchewan government has now become enshrined in their legislation. On the 7th of August, 1979, the Saskatchewan government enacted a new human rights code with a strong section on affirmative action. It allows the government to approve affirmative action programs which have the force of law and it can order such programs where discrimination cases show the need in a workplace. The government will also require all government contractors to practice affirmative action.

In Manitoba, on the other hand, there are no affirmative action programs of this type.

In the spring of this year 300 workers were brought into northern Manitoba mining communities while unemployment rates in the Metis communities in the area are in excess of 60 per cent to 70 per cent. The Metis communities have made it clear that they want the

opportunity to work in the mines with proper training. They point out that it costs in the neighbourhood of $94 000 a year to maintain a family on social assistance and the services required along with welfare when for $20 000 a person can be trained for an existing job. Without equal opportunity for jobs and training, Metis and Indians will continue to suffer at a subsistence level. The cycle of poverty will never be broken.

A quarter of the native people live in sub-standard houses. Only 30 per cent have running water. The infant mortality rate among native people is four times the rate in the rest of the population. Life expectancy for Canadian males is 69 years, but only 60 for native men.

Wally Firth the former Metis member of the House of Commons, says: "The multi-national oil and gas companies from the south can fly their people up, find the gas reserves, build a pipeline to ship the gas south, all without our help or participation. They look at us as an obstacle to be overcome, not as a people who may be able to help, or as a people with a vested interest in the land."

All of us in the labour movement feel we have done a great deal to advance the interests of workers be they men or women, black or white, native Canadians or immigrants. But of course we haven't done enough.

We've organized, and that's still the best way for women and minority groups to improve their status in the workplace. Equal pay for men and women was an old goal of the labour movement, and you see it discussed in the minutes of union meetings and legislative proposals from organized labour as long ago as the turn of the century.

Our own union's civil and human rights department has signed innovative agreements with employers in the United States to require that more minorities and women be hired and admitted to training programs.

The important difference between Canada and the U.S. is that in the United States there is progressive legislation requiring affirmative action by corporations supplying goods to the federal government.

Governments in Canada with the notable exception of Saskatchewan haven't done this yet, but they should. And they should enact affirmative action laws and equal-pay-for-work-of-equal-value legislation as well. They will have the union movement's support when they do.

Our union recently was involved in a precedent-setting Supreme Court case involving so-called reverse discrimination. Brian Weber, a white worker at a Louisiana plant, claimed he was illegally

denied a training course because of a joint program negotiated by the Steelworkers and Kaiser Aluminum to require that black and other minority workers and women be "quotaed" into skilled trades training programs.

Brian Weber lost out. I have serious qualms about any program that requires quotas although in the United States the black workers heritage in slavery still means less opportunity, lower pay, less freedom of choice on where to live. Do we have to wait till things get so bad in Canada that we require quotas to guarantee women, minorities and our native Canadians fair play on the job and in society?

I hope not. I don't want to see us become a society where somebody must suffer so that someone else can get ahead. I don't believe that is the alternative at all. We must struggle for a society in which people are evaluated and rewarded on the basis of their rights as human beings, not on the basis of their colour, sex, education, educational background or occupational status.

Yes, I suppose there will always be differences in pay and perhaps always differences in the regard people have for one another because of the way the others live or the jobs people do. But we must not let the gaps become so wide that they cause envy or violence. The important thing is that we try to achieve equality of opportunity as well as equality of results or equality of entitlement. Who can say that the native person who hunts for his food is worth less than the city resident who shops for his provisions? Who can say that a teacher contributes more to society than a foundry worker, a doctor more than a stenographer? Who would dare play God and make such distinctions?

The doctor saves lives, it is true. But the doctor's training was paid by the taxes of the secretary.

Until we can settle such questions we require affirmative action in all its forms. When work is recognized and an hour's labour is recognized as worthwhile, no matter who does it, then we can begin to -- male or female, native or immigrant, skilled or unskilled -- have the kind of community and society all over Canada that ensures us security and freedom.

We will then have the kind of society I dream of -- in which affirmative action is unneccessary. Until that time my union is devoted to this idea. I hope we will have your support, the support of many more women in our membership so that we can accomplish a great deal more.

There is one final point I'd like to make. While we need effective legislation to end discrimination we know that this is a process which will take time. Women workers also need unions to protect their rights. A union is the best means to ensure the company complies with legislation and a union contract allows workers to file grievances when they are discriminated against.

In Ontario we have seen women's efforts to organize blocked by ineffective labour legislation where employers can stall for years as a means of breaking the union. At Fleck we saw strikebreakers cross picket lines under police escort which gives the employer an unfair advantage.

Today there's a strike for a first contract at Radio Shack in Barrie. About 80 per cent of the workers are women - they make $3.25 an hour. Radio Shack is owned by the Texas-based Tandy Corporation and they have broken unions across the continent. This company used every single legal trick it could to stall in the hopes of defeating the union. These workers have been trying to get a contract for a year. This is supposed to be an elementary right. We need anti-strike-breaking legislation and guaranteed first contracts. Only in this way will women and minority workers get the kind of protection they need so that they can conduct the fight for equality on the job.

DISCRIMINATION AND AFFIRMATIVE ACTION - DEFINITIONS: AMERICAN EXPERIENCE AND APPLICATION IN CANADA*

By
Walter S. Tarnopolsky

I. DEFINITIONS OF DISCRIMINATION

All of the antidiscrimination statutes in Canada specify certain prohibited actions, obviously implying that these are discriminatory, and frequently add to these a general clause that one may not "discriminate against" someone on one of the prohibited grounds. However, none of the antidiscrimination statutes, except for the Quebec Charter, provides a definition of the term "discriminate."

Thus, the various Acts provide that one may not "deny" access to or occupancy of certain services, facilities or accommodation because of certain named grounds. In the field of employment, one may not "refuse" to "employ" or "to continue to employ" or "refer" or "recruit" any person, or "refuse" to "train, promote, or transfer" any employee, or "maintain separate lines of progression for advancement," because of "race, creed, colour, ... etc." of such person or employee. The "equal pay" provisions specifically provide that a female employee shall not be paid less than a male employee, or at a rate of pay that is less, for "the same" or "similar or substantially similar" work. The federal Act is perhaps even more specific in its indication that such practices are discriminatory (and also includes a different criterion of comparability):

> #11(1) - It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.

As mentioned earlier, the Quebec Charter is the only Canadian antidiscrimination statute to provide a definition. This is set out in section 10:

> Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, civil status, religion, political convictions, language, ethnic or national origin or social condition. Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such a right.

---

*This paper was extracted from the chapter on "Definitions of Discrimination and Affirmative Action" in a forthcoming book on "Discrimination and the Law in Canada" by the author.

It should be noted that this definition accords very closely with that provided for the term "racial discrimination" in the International Convention on the Elimination of all Forms of Racial Discrimination, adopted by the United Nations in 1965, and ratified by Canada:

> Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment and exercise, on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

A combination of the two gives a definition of "discrimination" as:

> a distinction, exclusion, restriction or preference" which is "based on" one of a number of specified grounds, and which has "the purpose or the effect of nullifying or impairing the right of every person to full and equal recognition and exercise of ... human rights and freedoms in the political, economic, social, cultural or any other field of public life.

(1) Dictionary Definitions

The Oxford Dictionary defines "discrimination" as being:

> The act of discriminating; the perceiving, noting or making a distinction or difference between things; a distinction (made with the mind, or an action).

Thus, the term can be used to describe a thought or an overt act and, in relation to the object of the distinction or difference, such thought or act can be benevolent, or neutral, or adverse. In this way, on the one hand, the term can be used in a laudatory sense as synonomous with "discernment." This is illustrated by one of the alternative definitions offered by the dictionary of the term "discrimination" as being "the power of observing differences accurately, or of making exact distinctions." On the other hand, the dictionary also goes on to define the words "to discriminate against" as meaning "to make an adverse distinction with regard to; to distinguish unfavourably from others."

The American definition of the word "discrimination" as provided by Webster's New World Dictionary of the American Language, illustrates the three senses in which the term "discrimination" can be used, i.e., laudatory, neutral, or adverse, even in the absence of the word "against" following the word "discrimination." The term is thus defined:

1. The act of discriminating, or distinguishing, differences;
2. The ability to make or perceive distinctions; perception; discernment;

3. A showing of partiality or prejudice in treatment, specific actions or policies directed against the welfare of minority groups.

As must already be clear from the Quebec Charter and the International Convention referred to earlier, and from the prohibition in Canadian antidiscrimination legislation of specific instances of denial of access, or of differential treatment, the term "discrimination," as used in human rights legislation in Canada, is intended to have the third of the three meanings suggested in Webster's Dictionary, i.e., a specific act or a policy of partiality or prejudice in treatment directed against members of certain specified groups. Moreover, as will become obvious subsequently, although the concern may be with the motive or intent in some instances, it is the overt act and not the thought which is prohibited and, as a natural consequence thereof, in many cases action could be contrary to human rights legislation even in the absence of a discriminatory intent, if its effect is discriminatory.

(2) United States Definitions

Neither the federal Civil Rights Acts nor the Uniform Law Commisioners' Model Anti-Discrimination Act (which is based upon, and in turn forms the basis of, the various state civil rights acts), contains a definition of "discrimination." At most, section 703(a) of Title VII, the "Equal Employment Opportunity" part of the Civil Rights Act of 1964, indicates that certain practices "which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" are unlawful if based upon one of the prohibited grounds. In the end, however, one must turn to judicial authority for amplification and application of these definitions.

Perhaps the best way to commence a consideration of the evolution of the concept of "discrimination" to its current interpretation and application by the courts in the United States is to start with the exposition of this subject in 1972 by Professor Alfred Blumrosen, former Chief of Conciliations of the United States Equal Employment Opportunity Commission.[1] In this article, which was a consideration of the landmark decision in Griggs v. Duke Power Co.,[2] and the "Concept of Employment Discrimination" which resulted from it, Professor Blumrosen suggested that the concept of discrimination in employment opportunities evolved through three stages to the one arising out of the Griggs case.

---

[1] "Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination" (1972) 71 Mich. L. Rev. 59.

[2] 401 U.S. 424 (1971).

The first of these, which applied until the end of the 1940s, covered those "acts causing economic harm to an individual that are motivated by personal antipathy to the group of which that individual is a member." These acts consisted of prejudicial treatment resulting from deliberate denials of employment opportunities based on racial prejudice. Proof was required not only of the act of denial and of harm to the individual complainant, but also of a motive based on racial prejudice. In other words, the definition of discrimination was based upon "the evil-motive, mens rea or state-of-mind" test.

Then, during the 1950s and even into the mid-60s, after the enactment of the 1964 Civil Rights Act, the civil rights agencies came to apply what Blumrosen called the "equal protection" concept of discrimination. He described this concept as follows:

> Discrimination consists of causing economic harm to an individual by treating members of his minority group in a different and less favourable manner than similarly situated members of the majority group. Proof involves evidence of differential treatment and harm. Defence of justification available.

This concept recognized an individual's interests in securing the same treatment as the dominant groups in society. In line with it, "unequal treatment" could be used as evidence of racial animus. Thus, application of educational requirements, even if these were not job-related and even if surveys showed that certain minority groups had smaller proportions within the required educational standard, were not considered to be discriminatory because they neither violated the "evil motive" concept of discrimination nor the "equal treatment" concept. Similarly, even an employer located in a white suburban area who selected his employees from residents of the area, or an employer with an all-white work force who selected only employees referred by his present employees, committed no violation of either of the first two concepts of discrimination.

The third concept of discrimination, which had been evolving in the lower courts, and which was finally applied in the Griggs case, was described by Professor Blumrosen as follows:

> Discrimination consists of conduct that has an adverse effect on minority group members as compared to majority group members. Defence of justification for compelling reasons of business necessity is recognized.

In order now to consider this current concept of discrimination as declared by the Griggs case, and applied ever since, it is necessary to turn to an in-depth consideration of Griggs v. Duke Power Company.

The case arose from a class action brought against the Duke Power Co. by 13 of their 14 black employees. The trial court found that prior to 2 July, 1965, the effective date of the 1964 Civil Rights Act, the Company had openly discriminated on the basis of race in its hiring and assigning of employees at the plant, in that blacks were restricted to the "labour" department, where the highest paying jobs paid less than the lowest paying jobs in the other four "operating" departments, in which whites only were employed. As early as 1955 the company had instituted a policy of requiring a high school education for initial assignment to any department except "labour," and for transfer from the other "outside" department, i.e., "coal-handling," to any "inside" department.

When, on 2 July, 1965, the company abandoned its policy of restricting blacks to the "labour" department, not only was completion of high school also made a prerequisite to transfer from "labour" to any other department, but it also became necessary, in order to qualify for placement in any but the "labour" department, to register satisfactory scores on two aptitude tests.

Evidence showed that: (1) employees who had been assigned to other than the labour department before the requirements were imposed and who had neither taken the tests nor had a high school education, continued to perform and progress satisfactorily; and (2) that neither of the tests was directed to measuring, nor intended to measure, the ability to learn to perform any particular job or category of jobs; and (3) that the requisite scores used both for initial hiring and subsequent transferring approximated the national median for high school graudates, i.e., they would have screened out approximately half of all high school graduates.

The trial court found that while the company had previously followed a policy of overt racial discrimination, such conduct had ceased by the time that Title VII became effective and that Title VII was intended to be prospective, with the result that prior inequities were beyond the reach of the Act. It could be suggested that, in essence, the trial court applied the "evil motive" test. The Court of Appeals reversed the trial court in part, by rejecting the holding that residual discrimination, arising from employment practices prior to the Civil Rights Act, was insulated from remedial action, but did uphold the trial court in its conclusion that there "was no finding of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to white and Negroes alike." In essence, it can be suggested, the Court of Appeals applied the "equal treatment" test and found that the scheme was not wanting, at least unless it was shown not to be job-related.

The Supreme Court, however, in a unanimous decision delivered by Chief Justice Burger, rejected the equal treatment test in the following terms:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

In the course of his judgment he specifically rejected the "equal opportunity" test in the following terms:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touch-stone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

A 1975 case[3] summarized the approach of United States courts since the Griggs case under two headings: (1) proof of "current discrimination," and (2) the approach that the courts should take to "neutral practices perpetuating vestiges of discrimination." With respect to the former, the following summations were put forth as being well accepted:

> Notwithstanding the provision in Title VII allowing injunctive relief and back pay only where the respondent has intentionally engaged in unlawful practice ... courts have established that proof of discrimination does not require proof of intent to discriminate. All that is required is that the employment practice not be accidental ...
>
> Evidence of discrimination by design might also be based upon a history of minimal recruitment efforts in publicizing vacancies and openings in supervisory and management positions. The passive nature of past recruitment together with the failure to undertake affirmative recruitment efforts after the passage of Title VII may justify finding of discriminatory conduct ...

---

[3] Rogers v. International Paper Company, 510 F. 2d 1340 (1975).

With respect to "neutral practices perpetuating vestiges of discrimination," the Court referred to the Griggs case and others as having established the following:

> [W]here the prescribed qualifications rest on the factors, the ability to obtain which has denied minority applicants under the past discriminatory policies, then the criteria must be modified, to the extent possible, so as to substitute functionally equivalent criteria which does [sic] not have a discriminatory effect. Only where there are "available no acceptable alternative policies or practices which would ... accomplish [the business purpose advanced] equally well with a lesser differential racial impact," might a neutral policy perpetuating prior discrimination be retained... .

In McDonnell Douglas Corporation v. Green,[4] a unanimous decision of the United States Supreme Court held that the initial burden of establishing a prima facie case of racial discrimination could be met by the applicant showing:

(i) that he belongs to a racial minority;
(ii) that he applied and was qualified for a job for which the employer was seeking applicants;
(iii) that, despite his qualifications, he was rejected; and
(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

In this case the Court held that although an employer may justifiably refuse to rehire someone who had engaged in unlawful and disruptive acts against it, yet nevertheless the complainant could prove that this was a discriminatory action if he could show that this criterion was not applied alike to members of all races.

The Griggs rule that in Title VII "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation" was subsequently reaffirmed in 1975 in the case of Albemarle Paper Co., v. Moody.[5] This Court went on to affirm as well that:

> Given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injury suffered through past discrimination.

---

[4] 411 U.S. 792, 802 (1973).

[5] 422 U.S. 405 (1975).

Finally, both these cases reaffirmed the Griggs rule that once "the complaining party or class has made out a prima facie case of discrimination; i.e., has shown that the tests in question select applicants for promotion or hire in a racial pattern significantly different from that of the pool of applicants" then "the burden of showing that any given requirement [has] ... a manifest relationship to the employment in question shifts to the employer."

(3) United Kingdom Definitions

The first comprehensive antidiscrimination statute on racial grounds was the Race Relations Act of 1968. It contained a definition of discrimination, in Section 1, which provided:

> 1.(1) - For the purposes of this Act a person discriminates against another if on the ground of colour, race or ethnic or national origins he treats that other ... less favourably than he treats or would treat other persons, and in this Act references to discrimination are references to discrimination on any of those grounds.
>
> (2) - It is hereby declared that for those purposes segregating a person from other persons on any of those grounds is treating him less favourably than they are treated.

It will be noted that both definitions are concerned with unequal treatment, and probably only as a result of "intentional" discrimination. It might be added that the 1968 Act specifically provided, in subsection (2), that segregation was to be treated as less favourable treatment.

On 12 November, 1975, Parliament enacted the Sex Discrimination Act of 1975. Section 1 of that statute retained the essential of the earlier definitions of intentional or direct discrimination, but added also an important new provision, clearly influenced[6] by the experience in the United States, particularly the decision of the U.S. Supreme Court in Griggs v. Duke Power, to prohibit as well indirect, and even unintentional, discrimination, i.e., this new provision incorporates the "effects" or "consequences" interpretation. Subsection 1(1) provides:

> 1.(1) - A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if --
>
> (a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or

---

[6] L. Lustgarten, "The New Meaning of Discrimination," [1978] Public Law 178, 179-80; I.A. Macdonald, Race Relations - The New Law, London: Butterworths, 1977, 13; P. Allsop, ed., Current Law Statutes Annotated, London: Sweet & Maxwell, 1975, 6511.

(b) he applies to her a requirement or condition which he applies or would apply equally to a man but --

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it and,

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment because she cannot comply with it.

When a year later, the Race Relations Act of 1976 was enacted to replace the earlier R.R.A. of 1968, the new definition of "discrimination" in the S.D.A. was adapted to the R.R.A. It is obvious, from a reading of s. 1 of both Acts that ss. (a) deals with "direct" or "intentional" discrimination while ss. (b) covers the "indirect" or "consequences" or "effects" definition of discrimination.

Professor Lustgarten, in an excellent article on "The New Meaning of Discrimination,"[7] suggests that the following six issues have to be determined in cases involving an allegation of "indirect discrimination" or, as the term has been used here, discrimination proved by "effects" rather than "intent":

(1) Has the respondent applied a "requirement or condition"?

(2) Are the disadvantaged persons of the "same racial group" [or same sex] as the complainant?

(3) "Can the complainant "comply" with the requirement?

(4) Is the proportion who can comply "considerably smaller"?

(5) Is the inability to comply to the complainant's "detriment"?

(6) The justification defence.

Although each of these issues has been considered by hearing tribunals, time permits only a brief reference to the last of these, i.e., justification.

---

[7]See fn. 6, supra.

The factors that should be considered in balancing the employer's arguments of "justifiability" against the complainant's arguments that a particular condition or requirement is to his or her "detriment" were considered in a leading decision of the Employment Appeal Tribunal in Price v. Civil Service Commission:[8]

> First, the onus of proof lies upon the party asserting this proposition, in this case the Post Office. Secondly, it is a heavy onus in the sense that at the end of the day the Industrial Tribunal must be satisfied that the case is a genuine one where it can be said that the requirement or condition is necessary. Thirdly, in deciding whether the employer has discharged the onus the Industrial Tribunal should take into account all the circumstances, including the discriminatory effect of the requirement or condition if it is permitted to continue. Fourthly, it is necessary to weigh the need for the requirement or condition against that effect. Fifthly, it is right to distinguish between a requirement or condition which is necessary and one which is merely convenient, and for this purpose it is relevant to consider whether the employer can find some other and non-discriminatory method of achieving his object.

(4) Definitions of Discrimination in Canada

For the purpose of this paper a brief summary of attempts by hearing tribunals under the various human rights codes to grapple with a definition of "discrimination" will be provided, keeping in mind the three stages in the evolution of the definition referred to earlier as having been developed in the United States: (1) evil motive or animus; (2) differential treatment; (3) consequences or effects.

The reports of the various boards of inquiry in the various provinces abound with examples of the application of the "evil motive" and "differential treatment" definitions of discrimination. Because of limitations of space all of these cannot be discussed here. One should, however notice that even under the "evil motive" test, boards of inquiry have not been bound by direct evidence of the verified admission of a discriminatory intent on the part of the respondent, but have inferred the "evil motive" from the surrounding circumstances. (See, for example, the cases of Britnell v. Brent Personnel Placement Services (Ont. -1968) and Kennedy v. The Board of Governors of Mohawk College of Applied Arts and Technology (Ont. -1973). On this point it might also be useful to consider the following statement as to onus of proof provided, by Professor Harry Arthurs sitting as a Board of Inquiry in the case of Ruest v. International Brotherhood of Electrical Workers and Nicholls (Ont. - 1968):

> Seldom will those who act for motives which are forbidden by law and held in disrepute by the community announce in clear and unmistakable terms that they are acting for illicit motives.

---

[8] [1977] 1 R.L.R. 291.

> As experience under the Labour Relations Act has indicated much depends upon the ability of the tribunal to draw inferences from conduct which (at least in the eyes of the person familiar with employment relations) are reasonable if not compelling. Once these inferences are raised by the conduct of the respondent, an onus shifts to him of explaining to the tribunal that his motives were other than what they appeared to be.

In this he quoted from an Ontario Labour Relations board case -- Metropolitan Meat Packers Ltd., (1962) C.C.H.L.L.R., p.230, para.16:

> The primary onus ... lies on the complainant, but that does not mean the complainant is bound to prove by direct evidence every fact or conclusion of fact upon which the issue depends. Legitimate and reasonable inference may be drawn from all the evidence adduced and that which is clearly deductible from the evidence is as much proved as if it had been established by direct evidence .... It should be borne in mind that the facts as to the real reasons for discharge often lie peculiarly and necessarily within the knowledge of the respondent ....

On the matter of the inference of discrimination based upon "differential treatment," reference might be made to the Saskatchewan case of Ermine v. United Enterprise Ltd. and the Capri Motor Inn, (1976) where the Saskatchewan Human Rights Commission, based upon facts indicating that a native Indian was required to pay for a hotel room in advance, where such requirements were not imposed on persons of the Caucasian race in identical circumstances, concluded that this was an act of discrimination.

In more recent years there have been a number of decisions applying the "consequences" or "effects" definition. Only one example, based upon sex, and one upon religion, will be referred to. The first of these is Tharp v. Lornex Mining Corp. Ltd., (B.C. - 1975) where the respondent had made facilities in its bunkhouse on a mining site available to the female complainant on the same basis that if offered the same accommodation to the other employees (all males) at the campsite. However, the result was that the female complainant claimed she lacked privacy in her accessibility to the toilet and washroom facilities. The chairman held that "identical treatment does not necessarily mean equal treatment or the absence of discrimination." What the respondent had failed to do, according to the chairman, was to offer the complainant toilet and washroom facilities which she could use with the same degree of privacy provided the male residents of the bunkhouses. Therefore, the chairman concluded, the complainant was discriminated against on the basis of sex.

Another example of the application of the "effects" definition concerned an allegation of discrimination on the basis of religion. In the case of Singh v. Security and Investigation Services Ltd., (1977) an Ontario Board of Inquiry held that a

requirement equally applied to all employees in having a clean-shaven face, hair properly cut, and the wearing of a special cap, when used as a basis of refusing to employ a practising Sikh, raised a "prima facie case of contravention of the Ontario Human Rights Code" as a result of which, "the burden of proof must shift to the company" to show that it was "unable to reasonably accommodate an employee's or prospective employee's religious practise without undue hardship on the conduct of its business." Since the board chairman concluded that the respondent had not met this onus, he found that discrimination had occurred.

II. CONTRACT COMPLIANCE AND AFFIRMATIVE ACTION

(1) Contract Compliance

(a) In the United States

The various positive or affirmative steps which have been taken to prevent or overcome discriminatory practices or to ameliorate the disadvantages of certain groups, and which have been either ordered following a finding of past discrimination, or required by governments as a condition of doing business, or which have even been voluntarily adopted, have come to be known as "affirmative action" programs. Since this term, and the action taken thereunder, first achieved currency in the United States in the context of "contract compliance," and then evolved in tandem with it, "contract compliance" will be discussed first.

"Contract compliance" has arisen not out of legislation but rather out of Presidential Executive Orders which require government contracts and subcontracts to contain certain clauses. These have been upheld on the basis that the federal executive has the right to determine the terms upon which it will enter into contractual relationship.[9]

The evolution of "contract compliance" to its present scope and application can be seen as having passed through four phases. The first Executive Order dealing with racial discrimination, was issued by President Roosevelt in 1941 as Executive Order No. 8802. At this initial stage, the order merely required that all defence contracts with federal agencies would have to include as a condition of the contract, a stipulation that the contractors not discriminate in employment because of race, creed, colour, or national origin.

---

[9] Farkas v. Texas Instrument, Inc., 375 F. 2d 269, certiorari to the U.S. Supreme Court denied, 389 U.S. 977 (1977). For a good recent description of "contract compliance" and some questioning of its constitutional basis, see J. Moeller, "Executive Order No. 11246: Presidential Power to Regulate Employment Discrimination," (1978) 43 Missouri L.R. 451.

The next major stage came in 1953, when President Eisenhower issued Executive Order No. 10,479, which created a Government Contract Committee to enforce the order.

The third phase came in 1961, when President Kennedy issued Executive Order No. 10,925. This Order was the first one to go beyond requiring merely the undertaking not to discriminate: it mandates a promise that the contractor would take "affirmative action":

> The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, creed, colour, or national origin. Such action shall include, but shall not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other compensation; and selection for training, including apprenticeship.

Finally, after the enactment of the Civil Rights Act of 1964 President Johnson promulgated Executive Order No. 11246, in 1965. This is the order that is currently in force (although subsequent Executive Orders have amplified its scope and application). Executive Order No. 11246 established the Office of Federal Contract Compliance (O.F.C.C.). What is more important, however, is that the order expanded the coverage to require inclusion of the equal opportunity clause not just in the employment concerned with the particular contract, but also, since the clause was to apply "during the performance of [the] contract," to all of the employer's operations. To grasp the full scope of this crucial equal opportunity clause, it is reproduced here in full:

> During the performance of this contract, the contractor agrees as follows:
>
> (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicious places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicious places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the provisions or Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of Sept. 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

Further amendments by Executive Order No. 11478 of 1969 established the Office of Minority Enterprise to encourage and supervise what are called "special provision programs"[10] which require prime contractors to allocate portions of contracts awarded to them to minority contractors and sub-contractors.

In the field of construction contracts, the O.F.C.C. has taken the approach of encouraging voluntary action on an industry-wide basis. The O.F.C.C. brings together representatives of the minority community with labor and management to come up with what is called a "hometown plan", or, if an agreement cannot be reached, such a plan might be imposed. There have been a number of challenges to both the imposed and the voluntary plans, but their essential validity has been upheld.[11]

Since the plans, even when imposed, are drawn up in consultation with the employers, unions and minority communities in the city concerned, they vary very widely. It would be beyond the scope of this study to deal with all these variations. Perhaps this part can be concluded with a reference to the model hometown plan suggested by the Department of Labor in 1970. The plan consists of some 14 elements which include: a statement of purpose calling for increased minority utilization; establishment of goals for increasing minority employment; establishment of training programs to upgrade the minority labor force engagement in job referral programs; contacting community organizations to refer minority workers; special recruitment of trainees and apprentices; integration of the unions involved; and, overall, an adoption of a "good faith effort" to comply with the plan, and a community-involved review body.[12]

(b) Contract Compliance in Canada

This discussion will be very brief for two reasons: (1) The only "contract compliance" provision in antidiscrimination statutes in Canada is s.19 of the Canadian Human Rights Act, and even that provision, by its very terms, provides that "the Governor in Council may make regulations respecting the terms and conditions to be included in or applicable to any contract, licence or grant." As of the summer of 1979, these have not yet been issued. (2) The only "constitutional" question concerning "contract compliance" is that of the distribution of legislative jurisdiction, but that it too detailed to be dealt with here.

---

[10] See L.S. Platt, "Federal Contract Compliance: Use of Special Contract Provisions to Encourage Minority Employment," (1977) 8 Loyola U.L.J. 913.

[11] 311 F. Supp. 1002, aff'd, 442 F. 2d 159, certiorari denied 404 U.S. 854 (1971).

[12] For a detailed study of the development and installation of one such plan see C.J. Clark, "The Creation of the Newark Plan," (1974) 23 Cath. U.L. Rev. 443.

(2) Affirmative Action in the United States and the Bakke Case

Part I of this paper outlined the significance of the Griggs case in the evolution of the American law concerned with overcoming inequalities in the American society, and the development therein and thereafter of remedies requiring positive and affirmative efforts in overcoming past discrimination. What was not referred to at any length was that such positive or affirmative remedies had already been ordered in school desegregation cases[13] and, subsequent to the Griggs case, were also used for overcoming sex discrimination[14] and reapportionment of voting districts.[15] In addition, as has just been discussed with respect to "contract compliance," the federal government had, at least since the mid-1950s, required "affirmative action" as a condition of contracting. The issue that was slowly arising in this development of "affirmative action" programs was whether the aims and methods chosen amounted to a "reverse discrimination," which would be contrary either to the "Equal Protection" clause in the Fourteenth Amendment to the Constitution, or to the Civil Rights Acts themselves. All of this can be placed in focus with a reference, which will have to be rather cursory, to the famous Bakke case.

On the last Wednesday of June 1978, the United States Supreme Court handed down its decision in the Bakke case -- the most important civil rights issue to come before that court since the famous Brown v. Board of Education[16] decision in 1954, which outlawed racial segregation in schools and, eventually, in all aspects of United States life.

The Case of Regents of the University of California v. Bakke[17] was concerned with a challenge to the admissions schemes of the Medical School of the University of California at Davis by Allan Bakke, a white male, whose application for admission in both 1973 and 1974 has been rejected. The challenge to the admissions scheme was coupled with a petition for relief to compel his admission to the Davis Medical School.

The School had two admissions programs for the entering class of 100 -- the regular admissions program and the special admissions program. The application forms sent out asked candidates whether they

---

[13] See, e.g., Green v. County School Board, 391 U.S. 430 (1968); McDaniel v. Barresi, 402 U.S. 39 (1971); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

[14] See, e.g., Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977).

[15] United Jewish Organizations v. Carey, 430 U.S. 144 (1977).

[16] 347 U.S. 483 (1954).

[17] 98 S.C. 2733 (1978).

wished to be considered as "economically and/or educationnally disadvantaged" applicants and members of a "minority group" (blacks, Chicanos, Asians and American Indians), for the purposes of being considered in the special program. If an applicant of a minority group was found to be "disadvantaged," he was then rated as against all other special candidates in a manner similar to that used in the regular admissions program, namely, a rating based on interviews, overall grade point averages, science course grades, the Medical College Admissions Test scores, letters of recommendation, extra-curricular activities, other biographical data, etc., all of which resulted in a total benchmark score." However the special candidates did not have to meet, as did the regular candidates, a 2.5 grade point cutoff and, of course, they were not ranked against candidates in the regular admissions process. It is interesting to note that over a four-year period 63 minority students were admitted to Davis under the special program and 44 under the general program. No disadvantaged whites were admitted under the special program, although apparently many applied. On both occasions that Bakke applied under the general admissions program his benchmark score was just under the lowest benchmark accepted in the general program. At the same time, however, special applicants were admitted with significantly lower scores than his.

After his second rejection Bakke brought action in the California courts challenging the special admissions program as being in violation of the Equal Protection clause of the Fourteenth Amendment, of the California Constitution, and S.601 of Title VI of the Civil Rights Acts of 1964, which provides:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any programme or activity receiving Federal financial assistance.

In the Supreme Court of the United States, four of the judges (Justice Stevens, Chief Justice Burger, and Justices Stewart and Rehnquist) found the Davis scheme to be invalid as being in violation of Title VI of the Civil Rights Act and upheld the judgment of the California Appellate Court ordering Bakke admitted to the Davis Medical School. Four other of the judges (Justices, Brennan, White, Marshall and Blackmun) concluded that although racial classifications call for "strict judicial scrutiny" under the Equal Protection Clause, nevertheless the purpose of overcoming the effects of past discrimination by society as a whole, resulting in substantial, chronic minority underrepresentation in the medical profession, was sufficiently important to justify the University's remedial use of race as an admissions factor. This group, therefore, concluded that the judgment below must be reversed in that it prohibited race from being used as a factor in University admissions.

The ninth judge, Justice Powell, provided the "swing" decision in that he sided with the Stevens group to hold that Bakke should be admitted, but at the same time joined the Brennan group in holding

that race could be a valid criterion for university admissions. He decided that the particular Davis program, which foreclosed consideration of persons like Bakke, was not essential to the achievement of the compelling goal of obtaining a diverse student body and was therefore invalid, not because of Title VI, but as being in contravention of the Equal Protection Clause. On the other hand, he concluded that although the Equal Protection clause called for "strict judicial scrutiny" of racial classifications, since, under the First Amendment academic freedom had been given important protection, then the goal of achieving a diverse student body was sufficiently compelling to justify consideration of race in admissions decisions.

(3) The Relevance in Canada of the Bakke Case

Without considering all of the implications of the Bakke decision for American jurisprudence, it is important to note those points of concern to Canadians that arise out of the different judgments rendered:

(1) Four of the five judges who held the Davis program to be invalid based their decisions explicitly and only upon the strict terms of s. 601 of the Civil Rights Act of 1964, and not on the Equal Protection Clause.

(2) Of the five judges who based their decisions upon the Equal Protection Clause, only one, Mr. Justice Powell, found the Davis scheme to contravene that Clause, while the other four, the Brennan group, held that the scheme was in accordance with that Clause.

(3) All five of these judges held that racial classifications may be used in order to eliminate or ameliorate "the disabling effects of identified, specific instances of discrimination," even "at the expense of other innocent individuals," where there have been "judicial, legislative, or administrative findings of constitutional or statutory violations," as part or remedies "for the vindication of constitutional [and statutory] entitlement."

(4) Four of these fives judges further held that such judicial, legislative, or administrative findings were not necessary for racially based programs to be instituted but could be adopted voluntarily by the institution itself for the purpose of overcoming serious disadvantage.

(5) Although only the Brennan group of four was prepared to accept the justification of overcoming past societal discrimination, or reducing the historic underrepresentation of traditionally disfavoured minorities in the professions, Mr. Justice Powell did seem to imply that

with sufficient evidence he might have been able to agree that racial classifications could be used in order "to promote better health-care delivery to deprived citizens," if the preferential program was "either needed or geared to promote that goal."

(6) Finally, five judges agreed that because of the value of academic freedom, race could be a factor, although not to be used alone, in achieving a "diverse" student body. In this event a racial "quota" could not be used, but race may be taken into account together with other factors in individual cases.

Let me now relate these salient points, which I have identified from the Bakke case, to the Canadian situation, to make four main propositions (including one cautionary observation within one of these):

(1) I want to expand on this later, but let me say first that the Bakke case in no way deals with the broad spectrum of measures that can be taken in pursuance of an "affirmative action" program, but merely the use of race alone as a basis for admission to a certain "quota" in professional schools.

(2) Only one of the nine judges in the Bakke case found the Davis scheme to be invalid because of contravention of the Equal Protection Clause: four others based themselves on the explicit words of s.601 of Title VI of the Civil Rights Act of 1964. There is no exact Canadian equivalent of this statutory provision. In fact, in seven of the provinces -- British Columbia, Manitoba, Nova Scotia, New Brunswick, Ontario, Saskatchewan and Prince Edward Island -- and at the federal level, there are explicit provisions for the adoption of "special" programs or measures, i.e., affirmative action programs, and explicit provision that these are not to be considered to be in contravention of the antidiscrimination statutes concerned.

(3) Even though only one of the nine judges on the U.S. Supreme Court found the Davis scheme to be in contravention of the Equal Protection Clause, whereas four others found it not to be so, it might still be useful to consider the barrier presented by such a clause in the Canadian context. On this point one should note that, apart from whatever construction one may put on the prohibitions against discrimination in the various human rights codes, the only near equivalents to the American Equal Protection Clause are to be found in s.1(b) of the Canadian Bill of Rights and the Alberta Bill of Rights. In both of these the comparable clause

is "equality before the law and the protection of the laws." Based upon the decisions of the Supreme Court of Canada on the Canadian clause, one would have to conclude that affirmative action programs are not in contravention of these.

(4) Five of the nine judges in the Bakke case specifically indicated that either in the face of Title VI or the Equal Protection Clause, race-conscious criteria could be adopted after a legislative, judicial or administrative finding of discrimination. The other four made no reference to this but, in the light of the Supreme Court decisions since the Griggs case, it is clear that they would have to acknowledge this proposition as being well established.

I will develop these propositions in reverse order.

Starting with the last one first, what is clear, and I think everything that goes before amply illustrates this, is that even in those Canadian jurisdictions where there is no specific provision for a "special program," and obviously also in those where there is such a provision, if there is a legislative, judicial or administrative finding that there was a pattern or practise which has resulted in discrimination against a whole class or group; an affirmative action to overcome this past practise could not possibly be considered "reverse discrimination," or invalid.

Dealing next with the possibility of a conflict between s.15 of the Canadian Human Rights Act, i.e., the provision for "special programs," and its possible conflict with s.1(b) of the Canadian Bill of Rights, one has to consider the jurisprudence we have on the latter clause. The leading case is that of Regina v. Drybones.[18] Mr. Justice Ritchie, who gave the majority judgment, while disclaiming an exhaustive definition of the clause, suggested:

> ...[S]ection 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

---

[18][1970] S.C.R. 282.

Later he emphasized that his judgment was to be limited

> ... to a situation in which, under the laws of Canada, it is made an offence punishable at law on account of race, for a person to do something which all Canadians who are not members of that race may do with impunity ....

In the Lavell case[19] Mr. Justice Ritchie gave the judgment of four of the nine members of the Supreme Court. In it, although he affirmed his Drybones definition, he specifically asserted that s.1(b) of the Bill of Rights "is not effective to invoke the egalitarian concept exemplified by the 14th Amendment of the U.S. Constitution as interpreted by the courts of that country." He then went on to adopt as his definition of the "equality before the law" clause, that put forth in 1885 by the English constitutional lawyer Dicey:

> ...[It] carries the meaning of equal subjection of all classes to the ordinary law of the land as administered by the ordinary Courts, and in my opinion the phrase "equality before the law" as employed in s.1(b) of the Bill of Rights is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary Courts of the land.

Without any explanation, he drew the distinction between the Drybones and the Lavell cases as follows:

> ...[T]he impugned section in the [Drybones] case could not be enforced without denying equality of treatment in the administration and enforcement of the law before the ordinary courts of the land to a racial group, whereas no such inequality of treatment between Indian men and women flows as a necessary result of the application of s.12(1)(b) of the Indian Act.

Mr. Justice Laskin (as he then was), giving the dissenting judgment, suggested that:

> The gist of the [Drybones] judgment lay in the legal disability imposed upon a person by reason of his race when other persons were under no similar restraint.

Interestingly enough he rejected adoption of the American "reasonable classification" test on the basis that the Canadian Bill of Rights "itself enumerates prohibited classifications which the judiciary is bound to respect." At first glance this might seem to be a basis for an analogy with the judgment of Mr. Justice Powell in the Bakke case.

---

[19] A.-G. for Canada v. Lavell; Isaac v. Bedard, [1974] S.C.R. 1349.

However, I have no doubt that the Chief Justice did not so intend that statement to be interpreted, and that he would not so apply it. In any case, not only was this a dissenting judgment, but one would have to totally invert the term "legal disability" in order to invalidate the "special" program which reaches out to grant certain advantages to those who are disadvantaged.

In two more recent decisions, where an attempt was made to give definition to the "equality before the law" clause, a new element was introduced. In Regina v. Burnshine[20] Mr. Justice Martland, giving the decision of the majority, upheld s.150 of the Canadian Prisons and Reformatories Act, which provided for indeterminate sentences in British Columbia of males "apparently under the age of 22 years," on the basis that the legislative purpose was not to impose a harsher punishment upon a particular age group in British Columbia, but rather "to seek to reform and benefit persons within that younger age group" because "that province was equipped with the necessary institutions and staff for that purpose." He continued:

> In my opinion, it is not the function of this Court, under the Bill of Rights, to prevent the operation of a federal enactment, designed for this purpose, on the ground that it applies only to one class of persons, or to a particular area.

He then went on to say:

> In my opinion, in order to succeed in the present case, it would be necessary for the respondent, at least, to satisfy this Court that, in enacting s.150, Parliament was not seeking to achieve a valid federal objective. (italics mine)

In 1976, in the Prata case[21] Mr. Justice Martland again, in giving the unanimous opinion of the Court stated:

> This Court has held that s.1(b) of the Canadian Bill of Rights does not require that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective .... [italics mine]

With these kinds of tests, one should have no hesitation in saying that s.15 of the Canadian Human Rights Act cannot be in contravention of s.1(b) of the Canadian Bill of Rights. Although on previous occasions I have been bitterly critical of some of the above decisions,

---

[20] [1975] 1 S.C.R. 693.

[21] Prata v. Minister of Manpower and Immigration [1976] 1 S.C.R. 376.

it was because the protection of the "equality before the law" clause was not being applied to invalidate what appeared to me to be provisions dealing more harshly, in the sense of deprivation or disability, with one group as compared with another. It would be ironic indeed if a majority of our Supreme Court, after having given a minimal application to the "equality before the law" clause, and after having failed to reach out, for example, to help Indian women achieve equality with Indian men, should now use this clause to invalidate a scheme which attempts to help certain groups reach up to a point of parity, either with other members of their group, or with all Canadians generally. Therefore, I see no basis for invalidating the "special programs" at the federal level or in Alberta (if such provision were made in the Alberta Individual's Rights Protection Act), and not in the other provinces where there is no equivalent of either the Canadian or American egalitarian clauses.

In view of what has been argued above with respect to any constitutional or legal bar in Canada to affirmative action programs, it is quite clear that at least in those jurisdictions in which specific provision is made for them, these programs can in no way be held to be unlawful. Our remaining problem is with those jurisdictions which do not make such special provision.

On this point it is important to note what was said in the first part of this paper with respect to the definition of discrimination. Where by specific intent or, even with lack of intent, the effect of employment, education or accommodations practices has been to disadvantage people because of an immutable characteristic, it cannot be considered "discrimination" against other people, who do not possess the same characteristic, if the disadvantaged are helped to achieve at least relative equality of opportunity. What is attempted to be achieved by affirmative action programs is what was referred to in the Brennan judgment as: enabling members of disadvantaged groups to be able to "come to the starting line with an [opportunity] equal to [the dominant majority]." As Mr. Justice Blackmun stated: "in order to treat some persons equally, we must treat them differently."

One additional argument that should be made in distinguishing the Canadian situation from that in the United States, as proposed by Mr. Justice Powell in the Bakke case, is that in Canada, from the very beginning, we have recognized that in certain instances justice to individuals can best be achieved by making special provision for groups. Thus, the British North American Act, in s.93, makes provision for certain group religious rights with respect to separate schools, and s.133 protects certain group language rights with respect to the Legislatures and Courts of Canada and Quebec. Unlike the history of the United States, Canada's history has involved accommodation to and recognition of group rights. Therefore, although the right to non-discrimination is essentially an individual right, in a country which recognizes that justice and equality of dignity involves recognition of rights which one has as a member of a group, it should be no great

extension of this principle that the rights of individuals who are members of a disadvantaged group might best be realized by programs which are directed toward aiding those groups to reach the same "starting line" as the rest of the population.

In fact, what is almost totally forgotten in this country is that for at least the last decade we have witnessed in Canada the greatest affirmative action program of all, and this is the recruitment of Francophone Canadians into the federal public service. When, after a century of Canada's existence, it became obvious (at least partly through the Report of the Bilingualism and Biculturalism Commission), that Francophone Canadians in the federal public service comprised a much smaller proportion than their proportion of the total Canadian population, it became obvious that "special" programs of recruitment, placement and promotion would have to be adopted to overcome this anomoly.

At this point I would like to insert two cautionary observations which are Mr. Justice Powell's concern that in concentrating on the most disadvantaged groups one might overlook others who, although not so badly off as a group, might also have suffered discrimination in the past, intentional or not. The Bakke case aroused deep fear in other ethnic and racial groups that they might be restricted by quotas, or by-passed in affirmative action programs. This in no way detracts from our obligations to our most disadvantaged peoples; it is merely to caution that there still are other ethnic groups who are outside most decision-making centres, and should be kept in mind.

This brings me to the first of my four propositions, i.e., that even if the Bakke case has any relevance to the Canadian situation, it might only concern the use of race alone as a basis for admission to a certain "quota" in professional schools. I know of no program in Canada which is exactly the same as that of the Davis Medical School held invalid in the Bakke case. However, certainly at Osgoode Hall Law School, and in other law schools in Canada, the fact of being a member of a "disadvantaged" minority is a factor amongst many others in determining admission. In addition, in a fashion that would clearly have been approved by the Brennan group of four, and was even accepted by Mr. Justice Powell in his discussion of the Lau case, the "special program" at the University of Saskatchewan, administered by their Native Law Centre, could not possibly be challenged as conflicting with any kind of egalitarian concept. This program involves a special pre-law program, of approximately eight weeks, in the summer preceding entry to law school, available to our native peoples, whether status or not. Even if one could not argue that there was in Canada the same animus or intent of discrimination and segregation toward the native peoples that seems to have been evident in the United States by the whites against the blacks, it would be difficult to try to prove that the position of our native peoples, whether status or not, vis-à-vis the white majority, is any better than that of the blacks in the United States vis-à-vis their majority, as described by Mr. Justice Marshall. In the light of this, this "affirmative action" program could not be held invalid either in Canada or the United States.

I should really go on to give more examples of the kinds of affirmative action programs which have been adopted in Canada and which I consider not just necessary, but also in no way invalid, either on legal or constitutional grounds. However, time does not permit me to do so and, fortunately, the other speakers and panelists at this conference will be able to provide further examples. In addition, a recent conference was organized by the Canadian Human Rights Commission to start preparing a catalogue of such programs in Canada. It is to be expected that in the coming years what is available and what could be tried will become better known.

Let me, instead of providing further illustrations, at least in closing provide a definition of "affirmative action" as a basis for discussion. It is not my own, but that offered in 1968[22] by George Blackburn, the then Director of the Fair Employment Practices Branch of the federal Department of Labour:

> affirmative action means any action taken to break historic social patterns of rejection, based on race, colour, religion, or national origin, [today we would add "sex], which have produced seriously disadvantaged minorities, whether or not these patterns result from cold-blooded, calculated conspiracies (which is how the minorities see it) or merely result from thoughtlessness, apathy and lack of awareness.

---

[22]Given in his address on "Affirmative Action" to a Conference on Human Rights sponsored by the B.C. Commission for the International Year for Human Rights, November 22-23, 1968.

APPENDIX

Canadian Provisions for Special Programs or Affirmative Action

The first Canadian provision for "approved programs" was adopted by Nova Scotia in 1969. It is now s.19 of the Nova Scotia Human Rights Act:

> 19 The Commission may approve programs of government, private organizations or persons designed to promote the welfare of any class of individuals, and any approved program shall be deemed not to be a violation of the prohibitions of this Act.

(British Columbia adopted a similar provision in 1973 -- now s.11(5) of the B.C. Human Rights Act and the Northwest Territories in 1974 -- now s.14 of the Northwest Territories Fair Practices Ordinance).

The next Canadian provision for "special programs" was enacted by New Brunswick in 1971 -- now s.13 of the N.B. Human Rights Act:

> 13(1) On the application of any person, or on its own initiative, the Commission may approve a program to be undertaken by any person designed to promote the welfare of any class of persons.
>
> 13(2) At any time before or after approving a program, the Commission may
>
> (a) make inquiries concerning the program,
>
> (b) vary the program,
>
> (c) impose conditions on the program, or
>
> (d) withdraw approval of the program,
>
> as the Commission thinks fit.
>
> 13(3) Anything done in accordance with a program approved pursuant to this section is not a violation of the provisions of this Act, 1971, c.8, s.13.

Saskatchewan adopted a similar provision in 1979 -- s.47 of the new Saskatchewan Human Rights Code, except that it goes further in empowering the Commission to "order" such programs.

Section 6a of the Ontario Human Rights Code (adopted in 1972) provides:

> 6a. Notwithstanding the provisions of this Part, the Commission may, upon such conditions or limitations and subject to revocation or suspension, approve in writing any special plan or program by the Crown, any agency therefor, any person to increase the employment of members of a group or class of persons because of the race, creed, colour, age, sex, marital status, nationality or place of origin of the members of the group or class of persons. 1972, c.119, s.7.

(The Manitoba Human Rights Act has a similar provision in s.9, adopted in 1974).

Section 15 of the Canadian Human Rights Act, enacted in 1977, provides:

> 15. (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status or physical handicap of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

EQUAL OPPORTUNITY - ROYAL BANK

By
P.H. Tucker

The Royal Bank has been involved in equal employment opportunity for a number of years. We have a particular interest - approximately 75 per cent of our employees are women. Why are we involved? In fact, why should any company be actively committed to affirmative action? Put quite simply, the female work force represents a tremendous pool of human ability that has yet to be fully tapped. Human resources do not generate the same immediate concern and attention as the world's natural resources, however, our human resources are equally as important and must be developed if we are to continue to grow and prosper. We can no longer afford to waste the potential contributions of capable people for artificial reasons.

Women in banking began to draw attention to their ambitions, and to the barriers before them, about a decade ago. Consequently, it was not until then that management began to view women bankers as real candidates for significant training and advancement. Quite candidly, there was no planned approach to developing this potential 10 years ago, however, the more obvious barriers to the advancement of women were removed. Removing the obvious barriers doesn't in itself create the necessary environment. Not so obvious barriers can continue to stifle equal employment opportunity. To deal with these more subtle inhibitors, you require a well-planned, well-managed program with full commitment from the top executive.

In January of 1977, the president of the Royal Bank appointed a task force on the status of women in the bank with a one-year mandate to review the Royal Bank's personnel policies and practices. The task force submitted their report in February 1978. In a nutshell, the report stated that without exception, Royal Bank policies were non-discriminatory however the task force did find areas of discrimination when some policies were put into actual practice. To eliminate inequities and gaps that exist between written policies and the actual application and carrying out of the policies, the task force made a number of recommendations. The key recommendations concerned mobility, training, job opportunities, assessment of potential, awareness sessions, and building accountability for results into key mandates. In an interim report, the task force recommended the appointment of an equal employment opportunity co-ordinator to work with the task force and to assist with the implementation of the recommendations.

The president and his executive committee accepted the report and several programs were then set in motion. We determined that all programs would be equally available to men and women and that wherever possible, EEO objectives would be integrated into existing plans.

One of the purposes of this conference is for you people to gain an understanding of the current equal employment and affirmative action programs and practices of employers and trade unions in both the private and public sectors. At the Royal Bank, we have a number of programs under way and I would like to give you a brief description of how some of these work.

Opportunities Program

We have found that women do not know what positions are available in the bank; they do not know how to obtain them, nor what training is needed. We have found that many women feel their access to information about promotional openings is poor. A survey of the bank's senior women showed a lack of knowledge of how the system works.

In response to this problem, the bank is in the process of introducing a program to give employees an opportunity to apply in advance for positions which interest them. The program, entitled "Opportunities" consists of four basic components:-

a) a catalogue of positions;
b) a position request form;
c) notification of candidates as to whether or not they have been accepted;
d) career counselling.

The main purpose of the program is to facilitate more active participation in career development through self-nomination for future openings. The catalogue of positions provides the information about the types and numbers of positions that exist in Canada as well as the eligibility criteria and qualifications required to be considered for various positions. Information is provided to supervisors to enable them to counsel employees on different career possibilities, and identify developmental plans required for the individuals to reach their career goals.

Awareness Sessions

As the Royal Bank makes a major effort to improve the position of women in the bank, an important prerequisite is that management at all levels understand the issues and attitudes surrounding equal employment opportunities for women.

To accomplish this, we developed with the assistance of Rosabeth Kanter and Barry Stein of "Goodmeasure", awareness sessions. These sessions which take the form of workshops are based on the premise that awareness comes only with access to facts, and with knowledge and understanding. Through readings, sharing of information and discussions, we hope to make royal bankers aware of the biases and prejudices which do exist. It is important that everyone is made aware of what impact these unfair approaches have on the bank and how important it is to keep them out of business decisions if the bank is going to make most effective use of its human resources.

Our emphasis is on minimizing tension and confrontation. We do not deal with changing anyone's attitudes. All we can do is encourage learning, add to the participants' capacity to see things in a broader definition, and let them be their own judges.

A second objective of the workshops is to build relationships and to make connections among different people. This is particularly relevant in giving men a chance to form relationships with women, in the sense of being able to talk about things that are relatively unusual or that deal with common issues at work. Moreover, it is important for people to be connected, to have access to networks of information and support. In that sense, women tend to be systematically disadvantaged. Participants are brought together from different departments and branches to provide the possibility of building new networks, or providing new connections for people.

Another objective is to develop more options and alternatives. We believe it is important for people to leave workshops with a sense of possible action, with some ideas of what each can do, such as: what can I do as an individual; how can I make a contribution; what could I consider that would contribute to this area? And so, we are not asking or expecting people to develop formal action plans but, rather, to develop a set of options, possibilities, new alternatives, so that there is a possibility of action later.

Identification of High Potential People

Identification of women with high potential is the key to the improvement of the place of women in the bank. Better mechanisms are being prepared to ensure that promising individuals are not overlooked. The bank is also committed to finding better ways to train women for positions at all levels.

Mobility

Policies and practices must continuously be reassessed in light of equal opportunity philosophy. One example within our company, which undoubtedly applies to most companies which are geographically spread through the country, is the question of mobility.

Mobility has been one of the most difficult issues addressed by the task force. It interrelates with many other areas and, perhaps most important, it is perceived to be a major cause of concern by the staff, male and female, at all levels. Traditionally, the bank has created and enforced the concept that full mobility anywhere in Canada is a prerequisite to a successful banking career. The requirement of full mobility as a qualification for promotion militated against women more than men. Women not prepared to relocate missed out on the training necessary to assume higher level jobs and therefore do not move up within the job hierarchy.

While it is a thorny problem and solutions and changes will not be simple, we can and are developing better ways of ensuring that mobility requirements do not have a discriminatory effect for women or men. Unnecessarily high or rigid mobility requirements could have been denying the bank the full potential contribution of which some of our people are capable. As we change this, the bank will benefit and so will its staff.

Accountability

Corporate objectives are more easily achieved with clear-cut accountability for results. While many functions in the bank do not lend themselves easily to the establishment of quantifiable accountabilities, it is fortunate that results of equal opportunity practices can be measured.

Accountability for equal employment opportunity begins at the most senior levels of the bank and is delegated downward. Specific objectives are being built into mandates and key result areas of expectation. Performance appraisal will be based in the normal way on the attainment of these objectives. District personnel managers will have special responsibility for training and development of women and ensuring promotable women are brought to the attention of those administering the selection system.

Problems That Occur

Obviously, such major changes in society and more specifically, in business, have created problems. Our solutions are experimental and certainly not definitive answers.

The biggest and most obvious problem is backlash. Backlash not only from men but women as well. Men who fear reverse discrimination, women who feel others are too militant, unfeminime bra-burners, etc. Reasons given for this backlash are often unfounded and can create a smoke screen difficult to diffuse.

In general, we have found that EEO programs should be integrated into the total personnel management strategy. Plans should be conceived that benefit both sexes. Action steps should be operational and not just theoretical. The entire issue should be communicated up front to the employees and the public so that information flows and emotional reaction based on misinformation is diffused.

In closing, I would like to emphasize that we can no longer afford to waste the potential contributions of capable people for artificial reasons. The challenge of equality of opportunity for Canadian management is to put an end to this waste.

AFFIRMATIVE ACTION AND UNIONS

By
Alice Carson

While I intend to address my remarks primarily to affirmative action as it relates to women, my union is also most concerned about the many faces of discrimination that we see in the workplace. However, very little research has been done into the problems of handicapped workers or workers from minority racial groups.

Human Rights legislation disallowing such questions on application forms, while providing minimal protection for workers, effectively hampers research of this kind.

An Equal Opportunities Program was established in the City of Vancouver but the person hired to research and implement the plan, Shelagh Day, found every possible obstacle placed in her way. She and the program were attacked and maligned daily in the press. An election took place. The forces and reaction and darkness gained power and the program was cancelled.

The Union I represent, the B.C.G.E.U., has been cited by June Callwood, in her book "The Law Is Not For Women," as being one of the Unions in the forefront of promoting equality between men and women workers.

If that is true, then I believe that the trade union movement has not been an ally of those of us who wish to see discrimination eradicated. In simple terms, if our record is one of the best, then the records of some other unions must be abysmal.

Certainly, by before-and-after comparative standards, we in the B.C. Government Employees' Union, have moved light years in less than a decade. But, measured against the ideal, we've only moved inches.

We represent 46 000 workers of which between 18 000 and 20 000 are women. Our members perform over 1 500 different jobs. But, women are effectively prevented from entering many of them.

Without reciting a litany of job classes, let us just note that there are now women

Plumbers
Ships' Officers
Equipment Operators or
Forest Rangers

But, there is one male stenographer!

I just don't believe that that is a result of the lack of qualified applicants. Rather, I believe that a large number of factors are simultaneously at work.

I categorize those factors as Pre-selection, Selection and Post-selection, and I would like to spend a moment on each category.

Pre-selection takes place before a worker enters the workplace. It is done by educational streaming; by sexual stereotyping in the home; by restricting access to vocational and/or technical training; and by minimal recruitment in entry level positions which career stream to the male sanctuaries.

If a woman can overcome the pressure of society to conform to precedent, then she must face the Selection factor.

Among Selection criteria which create sexual discrimination, are inappropriate physical and/or educational standards in the job classification specifications; Selection panel manipulation or "The support of male selectors for male selectees;" and, finally--the "we've always selected this type" attitude. To change now would be admitting we were wrong in the past. "Why mess with a system that works?"

For the very, very few who successfully leap the first two hurdles, comes the final Post-selection factor. The first woman in a male domain will encounter resentment born of fright from their male co-workers. Too frequently the male attitude will be that women drive wages down; that women are given the "soft" assignments; and that women can't, for some never explained reason, do the job.

But, just as effective is Supervisory Sabotage. Frequently, the co-workers accept the first woman on the job, but the supervisory hierarchy doesn't. By covertly assigning an inordinate share of nasty duties, by over-supervision and amplifying errors and other forms of harassment, they drive the women from the workplace.

I am sure that the participants of this conference are aware of the causes of discriminatory hiring and promotion practices and are aware of the difficulties in obtaining true equality for women in the workplace. What I would like to comment on is affirmative action and its chance of overcoming the problem.

I see individual corporate affirmative action plans as tokenism--necessary and valid tokenism, but still tokenism. In its most positive form, affirmative action can, at best, create the atmosphere and cultural awareness necessary to allow major social change but, in itself, it is not, and will not be, that change.

An effective affirmative action program is a successful experiment. It provides documented proof of the discrimination that we know exists. It allows us to prove what we now only believe.

But, will the experience of fair hiring and promotion in one company, one industry, or one sector, really change our society at its core? I think not.

So, we have to make a choice. Do we concentrate on widening and increasing single affirmative action programs in selected, co-operative sectors and rely on social osmosis to take care of the others? Or do we legislate universal programs and create huge enforcement agencies needed to make it work?

My personal experience cries out that the latter will not be allowed to work. The legislators have shown their ability to pass, but not proclaim laws requiring social change or, when pressed, to pass, proclaim, but not enforce, that legislation.

In my province, for example, we have seen so few Human Rights cases referred to boards of inquiry, I must believe that B.C. has no discrimination - or I must believe that our legislators don't care. Recent public statements by Human Rights Commission members indicate the latter.

Universal legislated affirmative action won't work. It won't be allowed to work. Or, it will be administratively impossible to enforce.

So, that leaves us with option number one. Slow evolutionary change through pilot programs and broad exposure of the results.

It requires patience, and I wonder if the recipients of discrimination will have that patience. I don't think we have the right to ask them to be patient. I can't assess whether they will volunteer it. Those factors are out of our control, so I will concentrate on what I, as a trade unionist can do.

First, let me make one point. Unless an individual can enforce a condition, it is not a right. So affirmative action in the absence of a trade union is patronizing and advanced to meet the goals of one party - the employer.

"What the boss gives, the boss can take away."

A negotiated, enforceable, affirmative action program is the only real way to overcome discrimination. That requires a strong union and a mature collective bargaining relationship.

While the negotiation of the plan could take considerable time and energy, the fact that it has been negotiated rather than imposed, guarantees a higher possibility of success for a number of reasons.

First, it means that the majority of the existing work force know about, accept and endorse the plan. That gives the plan a perceived legitimacy that an imposed plan will not and cannot have.

Secondly, it means that the plan is formalized and enforceable through the grievance procedure. Union members still view arbitration of grievances as a "fair way." This removes the possibility of resistance rising from a legitimate apprehension of bias on the part of the work force.

Thirdly, a negotiated plan cannot be unilaterally altered. Both the employer and the work force have committed themselves to the concept and its implementation. If it appears to end up unworkable, then bilateral discussions and agreement are needed to resolve the impasse and the plan can be amended with the same legitimacy.

Fourth, and probably most important, individual resistance to the plan and its implementation can be identified and dealt with by the appropriate party to the agreement. For example, a recruiting officer who refuses to comply will be exposed by the grievance procedure and grievances can be denied by the Union when the basis of the grievance is contrary to the principles of the plan.

It all seems so simple - Why hasn't my union done it?

Well, in the first place, we are denied by the government the right to negotiate any promotional criteria. Nor do we have any rights by law to interfere with the recruitment process.

But even in the absence of those legislative constraints, I would not be optimistic.

"Merit" is the sole criteria for selection in government service. The word has become repulsive to many of our members because it has come to mean whatever the boss says it means.

The indefinable "personal suitability" factor has become the determining criteria and "personal suitability" involves totally subjective judgment.

Without admitting to it, selection panel members can put their own personal prejudices into play. It is apparent to me that recruiters recruit in their own wasp image and a selection panel of middle-aged men will invariably select someone who fits their conception of what is a "suitable" type of employee for the job in question. A suitable "type" to become a truck driver is a man. A suitable "type" to become a typist is a woman.

The Public Service Commission of British Columbia fills in excess of 4 000 jobs each year. They will not, and cannot, admit they have been wrong in applying "merit" in the past. If they were to admit it, they would also be admitting that they haven't complied with their statutory responsibility. They haven't done their job. They have not been competent.

My union has in the past challenged the Government of B.C. and we challenge them again today to establish a public inquiry commission into "merit" and the Public Service Commission. Let the cold, harsh light of day into the inner workings of the government's recruitment agency.

If the government has the courage to put on the bargaining table their hiring and promotional practices, then we, as a union, can give some assurances.

At present we can easily discard our responsibility to counter discrimination. We have no authority - no power - so, we have no responsibility - for responsibility must be accompanied by authority.

If the provincial government is prepared to give us the authority, we will take responsibility.

When we have the right to negotiate selection, we will do everything in our power to do away with the abhorrent typecasting of people.

The merit system was designed to do away with political patronage. Negotiations will do away with discrimination in selection. We can change that "selection factor" at the bargaining table.

We can change the "Post-selection" factor attributable to our members through our internal education program.

We can change the "Post-selection" factor attributable to supervisors through the grievance procedure.

And when we have changed the fabric of the work force, the Pre-selection factors will wither away.

As a woman, I would like to close with a personal demand on society as a whole. Give our sons and daughters access to a total range of options. Don't say to them what you said to me and to my sisters and brothers. - "You have to fill this one role." Don't teach them in our schools that there is but one way - the white, middle class way. Give them a society of options - cultural, life style, ethnic, career. Don't assign them but one!

ADDRESS

BY

Professor Alfred Blumrosen

Rutgers University

and

Consultant to U.S Equal Employment Opportunity Commission Chair,

Eleanor Norton

"Promotions, Layoffs and Seniority under the Antidiscrimination Laws of the United States"

Perhaps we south of the border are more litigious than you, I do not know. But we now have 20 volumes of case reports concerning the operation of our antidiscrimination laws which have been on the books for about 15 years. The "law" in these 20 volumes might be of some assistance to you, particularly in the more industrialized parts of your economy, as you come to grapple with some of the same problems with which we have been struggling. The following brief summary of our law, is offered in the spirit of helpfulness.

One distinction which has emerged in analysis of legal problems under the United States Federal Equal Employment Opportunity law, has been that between the individual complaint of employment discrimination, based largely on the facts of a single transaction, and the complaint that the employer and/or union has engaged in practices which have the effect of restricting employment opportunities to various groups of workers based on their minority status or sex. It will be convenient to consider these two classes of situations separately, although as we shall see at the end, they do coalesce.

I - The individual discrimination case

The classic model of an individual employment discrimination claim is the situation where an employee is denied a promotion, or is laid off, and asserts that the reason, meaning the purpose for selecting that employee rather than another, had to do with minority status or sex. In assessing claims of this type, which involve an examination of the facts of the particular transaction, the question is "what needs to be proved, and by whom?"

Employers early argued that the plaintiff needed to produce evidence that there was a "hostile motive" relating to the complainants minority status or sex, as part of the plaintiff's case in chief. The Supreme Court rejected that argument in McDonnell Douglas v. Green,[1] our leading case on the subject of individual complaint litigation. It was sufficient, said the court, for the plaintiff to show minority status, application, qualifications, a rejection, and a vacancy. On that showing, which did not speak to the employers motive, some kind of a burden shifted to the employer, to produce evidence of "justification." In short, the employer was required to explain why the particular personnel action in question had been taken. He might give as a reason, for example, that some other person was "better qualified." At that point, the plaintiff could produce evidence that the asserted reason was "pretextual," a "cover up" for discrimination. Evidence of "pretext" could include poor treatment of other minorities or women, and statistics showing their "restriction or exclusion" from the employment in question. Ultimately, the trier of fact, normally a judge sitting without a jury, would have to decide if there had been "discrimination." The Supreme Court has not been clear as to whether this "ultimate fact" includes a finding as to the "real motive" of the employer, or even who has the ultimate burden of proof on whatever the ultimate issue is.

I have suggested that whether there must be proof of "evil motive" depends on the theory or theories on which plaintiff is trying the case.[2] If the case is based on such a theory, of course plaintiff must prove it. But the case might be based on one of two other theories; that the plaintiff was treated differently from some other person because of minority or sex, or that the plaintiff was "adversely affected" by an employment practice which impinged differently on persons of different races or sexes. In either of these two situations, I have argued that "evil motive" is irrelevant. If an employer treats a similarly situated male and female differently, why should there be the need to make any further proof or inference about motive. It should be enough to find a violation to find the difference based on inconsistent treatment based on race or sex. Similarly, if the employer applies a policy which affects employees differently, depending on their race or sex, "good faith" should be irrelevant. Our Supreme Court has so held in cases which will be discussed in connection with systems of industrial relations. I believe these holdings are equally applicable to the individual case.

My conclusion from a study of administrative and judicial decisions in this area, is that where the facts are unclear to the judge, the decision often turns on statistics. If an employer has a "good record" of employment of minorities or women in the jobs in question, that employer is likely to prevail. If conversely, its record of performance is poor, it is likely to lose what would otherwise be a doubtful case of discrimination. This structuring of the law is consistent with the overall congressional objective of improving employment opportunities for groups previously excluded. It suggests to the employer that it can retain managerial flexibility by implementing an affirmative approach to minority or female employment. Conversely, if the employer persists in restricting or excluding minorities or women, its managerial prerogative will be limited by the court.

II - The case of discriminatory industrial relations systems; herein of seniority

The major advance in the theory of antidiscrimination laws which has taken place in the United States was signalled in the Supreme Court decision in Griggs v. Duke Power Co.[3] That case held that employer practices or procedures which had an adverse effect or disparate effect on minorities or women were illegal unless they could be justified on grounds of business necessity. Adverse effect or impact was to be determined by a comparison of the consequences of the employer practice on minorities and women, as against its consequences for others. Business necessity was to be narrowly construed and to be distinguished from "business convenience" which had probably given rise to the practice.

For example, in Griggs, the issue was the legality of a testing and high school diploma requirement. Far fewer blacks than whites had high school diplomas and blacks fare less well than whites

on written tests. These facts were sufficient to establish the adverse effect, and to require the employer to justify its action. It was unable to do so in anything more than vague generalities, which were not sufficient.[4] "Good motive" is not a defence.

Under this view of the law, it was thought for many years that seniority systems which were superimposed upon patterns of discriminatory job assignments, and thereby perpetuated the effect of such assignments, were illegal under title VII. Thus a departmental seniority system made it difficult for a minority or woman originally assigned to a "black department," or a "woman's job" to advance because they would lose job security and perhaps pay if they transferred to another department. This "adverse effect" perpetuated the original discriminatory assignment. Thus seniority unit restrictions on promotional opportunities were held illegal.

Similarly, for layoff purposes, the restrictive seniority units were required to be modified, so that blacks and whites, and men and women, competed for the fewer jobs remaining after a layoff on the basis of their total length of service, rather than on the basis of service in particular segregated departments.

However, the above analysis applied to the situation where a senior black or woman was restricted in employment opportunity as compared with a white or male hired later into a "favored" seniority unit. The opposite question arose, in the recession of 1974-75, with respect to an employer who had only recently begun to hire minorities or women, and was prepared to lay them off on a traditional "last-in first-out" basis. The few courts which addressed that problem afforded no protection to the recently hired minorities or women. At that time, my wife and I argued that the employer was required by the Griggs principle to seek alternatives to layoff which would have less adverse effect, and, if that was impossible, to conduct the layoff in a manner which limited the adverse effect, as by rotating or alternating layoffs.[5] This issue was not litigated. It was in part perhaps preempted by the decision of the Supreme Court in 1977 in Teamsters v. United States.[6] There, the court held that the "routine operation" of a bona fide seniority system would not violate the federal law even though it perpetuated the effect of pre-act discrimination.

This meant that in the case of the senior black versus the junior white, the mere fact that the seniority system carried forward the impact of a pre-act discriminatory assignment of the black to a black job, would not entitle the black to relief. However, if the black were denied a position after title VII became effective and his or her race played a part in that decision, then the black or woman would be entitled to full relief, including a seniority date starting the time he or she should have been hired or promoted. But, in order to be entitled to that relief, something more must be shown than the "routine operation" of a "bona fide" seniority system.

We are still not clear on what a "bona fide" seniority system is. We know that it is one which did not have its genesis in discrimination, and was not negotiated or maintained for the purpose of discrimination. But we have had few cases working out the meaning of that formulation. Furthermore, since most cases arising today involve "post-act" discrimination, the significance of the Teamsters' decision may be diminishing.

However, the Teamsters' decision may have some impact on the other problem, which seems to be arising again, the layoff of junior minorities and women under a "last-in first-out" clause. Where an employer has recently taken affirmative action to include such persons in the labor force, this type of layoff can amount to a segregation, and is certainly contrary to the underlying congressional purpose behind the antidiscrimination laws. However, as Teamsters has established, there was a countervailing congressional purpose, to afford some protection to expectations under seniority systems. The problem will be to adjust these two conflicting purposes. The issue around which this adjustment must take place may well be phrased in terms of the question "what is a seniority system?"

Under our statutory structure, the adverse effect principle applies, except to seniority systems. Since "last in first out" is clearly part of a seniority system, it would seem that its "routine operation" is protected. However, the matter is not so simple. First, 75 per cent of the private sector employees in the United States are not unionized. They may operate under informal, and normally not contractually binding, understandings that layoffs will take place on a "last-in first-out" basis. Are those systems "seniority systems?" Considering that the "bona fide" seniority provision was put into title VII at the behest of Trade Unions, a strong argument can be made that they are not, and that only collectively bargained seniority systems are protected.

The next question is what kind of rights are contemplated as falling within the definition of a "seniority system." For example, some collective contracts guarantee a specified workweek, such as 40 hours. Many others do not, but do contain a last-in first-out layoff clause. In that situation, does the "seniority system" encompass a guaranteed workweek? Arbitrators have divided on the question, and our courts have not passed on it. The answer is crucial to the last-in first-out layoff problem.

If a guaranteed workweek is not part of the statutory "seniority system" then the employer may be under the Griggs principle when it comes to deciding how to reduce its hours of work, and must adopt that alternative which will not have an adverse impact on the recently hired minorities or women. Hence, he may be required to go to a four-day week and not layoff at all. If, on the other hand, the term "seniority system" is read to encompass an implied guarantee that if there is work, it will go first to the senior employees, then a last-in first-out layoff may be proper, even in the absence of an express guaranteed workweek clause.

These questions may be answered during the coming years. They are open ones now. Their answer will ultimately be based on a complex balancing of the conflicting policy considerations noted above.

III - Discriminatory systems in individual cases and individual recovery for discriminatory systems

Both types of cases discussed above contain common aspects. For example, in an individual discrimination case, the plaintiff may show that opportunity was denied because of a system which had an adverse impact. For example, an employee might be rejected for lack of a high school diploma and might, in an individual case allege discriminatory impact. This allegation and proof would force the employer to justify the diploma requirement. If the employer failed to do so, then the employee would be entitled to full relief, hiring or promotion and back pay, and to an injunction which might not only accomplish that result, but would also forbid the employer from further use of the criteria.

Conversely, where the employer has been found to have discriminated because of the operation of a system, such as a seniority system or a height and weight requirement, it will be enjoined from maintaining that requirement. Presumptively, all individuals adversely affected by the requirement will be entitled to back pay or its equivalent. However, the employer is entitled to show that particular individual employees would not have secured the employment opportunity in question even if the employer had not discriminated. The employer, in other words, may try to establish that the individual claimant is not a "victim of discrimination." These cases begin to look much like the individual case under the McDonnell Douglas formula, with one important exception. That is that there is a presumption that the employee has been the victim of discrimination, which is not present initially in an individual case.

Fortunately for the legal system in the United States, most cases of this latter type are settled without massive trials of individual entitlement.

Conclusion

This summary cannot do justice to the depth and complexity of modern Employment Discrimination law in the United States. Fortunately, we now have a good text book, Schlei and Grossman, Employment Discrimination law, and a good law school case book, Murphy, Getman and Jones, Discrimination in Employment (1979). These tools will make our law more accessible and understandable to us, and perhaps to you as well.

I believe that in the 1980s, we will see improved methods for settling individual cases, such as those recently developed by the Equal Employment Opportunity Commission, and the evolution of a "bottom line" philosophy, which will further encourage employers to increase minority and female employment so that the social indicators which gave rise to the necessity for the laws; the higher unemployment rate, the lesser occupational status and the lower income levels of minorities and women will be reduced. This is the overall objective of our law. That our Supreme Court remains committed to this objective was demonstrated last summer in the case of Weber v. Steelworkers,[7] where the court upheld a race specific affirmative action program because its objective was to include minorities in skilled trades jobs from which they had traditionally been excluded. The plan was upheld because its purpose mirrored that of the statute. Thus the court put to rest at least part of the "reverse discrimination" issue in employment, in favor of programs which are consistent with the congressional purpose.

Footnotes

1. 411 U.S. 792 (1973)

2. Blumrosen, Strangers No More: All Workers are entitled to "Just Cause" Protection Under Title VII, 2 Ind. Rel. L. Jour. 519 (1978)

3. 401 U.S. 424 (1971)

4. Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59 (1972)

5. Blumrosen and Blumrosen, The Duty to Plan for Fair Employment Revisited: Work Sharing in Hard Times, 28 Rutgers L. Rev. 1082 (1975)

6. 431 U.S. 324 (1977)

7. 99 S. Ct. 2722 (1979)

PANEL ON

SENIORITY, PROMOTIONS AND LAYOFFS

Chair: Marc Lapointe
Chairman, Canada Labour Relations Board

Panelists: Ed Finn
Director, Publications and Information
Canadian Brotherhood of Railway, Transport and General Workers

Francis Folz
Equal Opportunity Officer
Toronto Board of Education

Bromley Armstrong
Commissioner, Ontario Human Rights Commission

SENIORITY, PROMOTIONS, LAYOFFS AND DISCRIMINATION UNDER THE CANADA LABOUR RELATIONS BOARD

By
Marc Lapointe

The panel over which I have the honour to preside will deal with seniority, promotions and layoffs as they relate to the overall theme of the Conference: Race and Sex Equality in the Workplace: A Challenge and an Opportunity.

My paper will deal with a review of the jurisdiction of the Canada Labour Relations Board in the area of seniority because as regards layoffs and promotions, it is only very peripherally that we are involved.

The Canada Labour Relations Board has no jurisdiction in general, once a collective bargaining relationship has been established by either certification or voluntary recognition on the contents of the collective agreement and over disputes stemming from its application.

There is one specific exception to this lack of jurisdiction. It is in connection with a business, whenever it is sold, leased or transferred from one owner to another. It is then stipulated that whenever this occurs and employees of an established bargaining unit are absorbed or intermingled with those of another, I quote:

> Upon application made to it, ... the Board shall take into account the extent to which and the fairness with which the provisions of the collective agreement, particularly those dealing with seniority, have been or could be applied to all the employees to whom the collective agreement is applicable.

We have had one case on the West Coast, on these provisions. The Board likes to approach all matters, whenever possible, in an accommodating fashion. In that case, the CBRT & GW - Canadian Brotherhood of Railway, Transport and General Workers and an employer were persuaded to offer guarantees that the seniority rights of the absorbed employees could be fully implemented and received evidence of this. There was no discrimination or unfairness discernible. If we had so found, we could have intervened.

I shall come back momentarily to other powers and competences of the Board in the area of discrimination.

Let me, however, state that in the whole area of seniority, promotions and layoffs in the workplace, an awful lot can be done or not done regarding race and sex equality. I am sure that our three panelists will enlighten you in that area.

Coming back to the Board which has to administer Part V of the Canada Labour Code, we find a limited number of sections therein touching upon discrimination and the protection of certain fundamental freedoms in labour relations.

They are:

> 134.(2) Nothwithstanding anything in this Part, where the Board is satisfied that a trade union denies membership in the trade union to any employee or class of employees in a bargaining unit by virtue of a policy or practice that the trade union applies relating to qualifications for membership in the trade union,
>
> (a) the Board shall not certify the trade union as the bargaining agent for the bargaining unit; and
>
> (b) any collective agreement between the trade union and the employer of the employees in the bargaining unit that applies to the bargaining unit shall be deemed not to be a collective agreement for the purposes of this Part.

Therefore, a union which would have established a discriminatory provision in its constitution concerning conditions for affiliation, would be refused certification if such discrimination were to be demonstrated or it could be decertified after the fact and its collective agreement annulled.

Then there is section 136.1

> 136.1 Where a trade union is the bargaining agent for a bargaining unit, the trade union and every representative of the trade union shall represent, fairly and without discrimination, all employees in the bargaining unit.

This provision is quite original in Canadian legislation. It is what we call the duty of fair representation which is now imposed on the bargaining agent. This results from amendments brought to the Code in June of 1978.

A similar provision had been in existence in many of the provincial labour codes for years.

This board, even prior to the amendment, had recognized that a necessary consequence of our system of certification which gives a monopolistic right to one union to represent all the employees of an appropriate bargaining unit whether they are its members or not, was that said bargaining agent acquired the countervailing obligation to deal without discrimination and fairly with the non members and had to represent them. The Canada Labour Relations Board always stated, prior to the specific amendment that it inferred the existence of that

obligation from the rest of the provisions in the Code. In this connection, I refer you to the following decisions, Télécapitale (16 Di 230), Saskatchewan Wheat Pool (21 Di 388) and B.C. Telephone (22 Di 507).

When coupled with the powers of the Board to remedy such a discriminatory practice, section 136.1 offers a forum to redress a pleiad of wrongs.

Section 189 reads as follows:

> 189. Where, under section 188, the Board determines that a party to a complaint has failed to comply with... or section 136.1, ... the Board may, by order, require the party to comply with that ...section and may
>
> (a) in respect of a failure to comply with section 136.1, require a trade union to take and carry on on behalf of any employee affected by the failure or to assist any such employee to take and carry on such action or proceeding as the Board considers that the union ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on;
>
> ...
>
> and, for the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any failure to comply with any provision to which this section applies and in addition to or in lieu of any other order that the Board is authorized to make under this section, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of such failure to comply that is adverse to the fulfilment of those objectives.

The existence of this section in the Code raises a serious query as to what happens when there is a possible conflict of jurisdictions between the Canada Labour Relations Board and the Canadian Human Rights Commission.

Section 9 of the Canadian Human Rights Act which that Commission has to administer states that an association which blocks the affiliation to a person or expels such person or suspends that person or restricts that person or limits the opportunity of that person to be employed or to be promoted because of an unlawful distinction which is discriminatory is guilty of an offence. An unlawful distinction being defined in section 3 as being:

> 3. For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap, are prohibited grounds of discrimination.

An employee who is not a member of the bargaining agent but the member of a bargaining unit, a woman, alleges that a grievance whereby she attempts to accede to a promotion is not being processed by the union in collusion with the employer because she is a woman and files a complaint before this Board, but also files a complaint before the Human Rights Commission. The Board hears the case and concludes there was no discrimination. The Human Rights Commission hears the case and concludes there was discrimination.

It could not happen you think? Let us see.

In 1975, one Derekson, filed a grievance through his union, alleging that he had been discriminated against by being forced to retire at age 65 by Flyers Industries Ltd. He lost before an arbitration Board properly constituted under the laws of the Province of Manitoba. He subsequently filed a complaint under the Manitoba Human Rights Act, on the same facts. He won.

The Canada Labour Relations Board is cautiously but diligently fostering meetings with the Canadian Human Rights Commission in order to lay down some rules of the game.

Then there is section 161.1 of the Code which was also introduced in 1978 by way of an amendment. It reads as follows:

> 161.1 Where, pursuant to a collective agreement, a trade union is engaged in the referral of persons to employment, it shall apply, fairly and without discrimination, rules established by the trade union for the purpose of making the referral.

After June 1, 1978, therefore, unions which operate a hiring hall must establish without delay, if they had not done so prior to that date, rules regarding the assigning of work to employers via a hiring hall and post said rules in said hiring hall. Further, these rules will have to be applied fairly and without discrimination.

In case of violations, the Board may issue an ordinance to comply. Further, an order, requiring the union to do or refrain from doing anything that is equitable to require the union to do or refrain from doing in order to remedy or counteract any consequence of such failure to comply, that is adverse to the fulfilment of the objectives of Part V of the Code may be issued.

Finally, Part V contains a series of unfair labour practices provisions which pertain to discrimination.

Section 185 prohibits certain acts by unions. They are:

> 185. No trade union and no person acting on behalf of a trade union shall
>
> ...

(e) require an employer to terminate the employment of an employee because he has been expelled or suspended from membership in the trade union for a reason other than a failure to pay the periodic dues, assessment and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union;

(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to him in a discriminatory manner the membership rules of the trade union;

(g) take disciplinary action against or impose any form of penalty on an employee by applying to him in a discriminatory manner the standards of discipline of the trade union;

(h) expel or suspend an employee from membership in the trade union or take disciplinary action against or impose any form of penalty on an employee by reason of his having refused to perform an act that is contrary to this Part; or

(i) discriminate against a person in regard to employment, a term or condition of employment or membership in a trade union, or intimidate or coerce a person or impose a pecuniary or other penalty on a person, because he

(i) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(ii) has made or is about to make a disclosure that he may be required to make in a proceeding under this Part, or

(iii) has made an application or filed a complaint under this Part.

In the case of Frank J. Nowotniak and Gordon E. Ostby et al, Board decision No. 194 (as yet unreported), the Board determined that a union had acted in a discriminatory manner when it modified its by-laws while in the course of being certified so as to refuse affiliation to two of its members. It was ordered to reintegrate into its membership said two members.

In the case of Val Udvarhely, Board decision No. 200 (as yet unreported) the Board annulled a suspension imposed in a discriminatory manner by a union upon one of its members.

Section 184 prohibits certain acts by employers, more particularly in subsection (3) which states:

184.(3) No employer and no person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person in regard to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

(ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union,

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(iv) has made or is about to make a disclosure that he may be required to make in a proceeding under this Part,

(v) has made an application or filed a complaint under this Part, or

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;

(b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred upon him by this Part;

(c) suspend, discharge or impose any financial or other penalty on an employee, or take any other disciplinary action against an employee, by reason of his refusal to perform all or some of the duties and responsibilities of another employee who is participating in a strike that is not prohibited by this Part;

(d) deny to any employee any pension rights or benefits to which the employee would be entitled but for

(i) the cessation of work by the employee as the result of a lockout or strike that is not prohibited by this Part, or

(ii) the dismissal of the employee contrary to this Part;

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that he may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part;

(f) suspend, discharge or impose any financial or other penalty on a person employed by him, or take any other disciplinary action against such a person, by reason of that person having refused to perform an act prohibited by this Part; or

(g) bargain collectively for the purpose of entering into a collective agreement with a trade union in respect of a bargaining unit, if another trade union is the bargaining agent for that bargaining unit.

In the case of Canadian Imperial Bank of Commerce (Alness Branch Downsview) (28 Di 921), the Board declared that two employees on maternity leave while a union was in the process of being certified and who were replaced by two permanent employees and transferred to another branch than the one in the process of being certified, were entitled to:

a) vote on the certificate issue

b) be returned to their branch if they so desired, the Bank having acted in a discriminatory manner because of their maternity status which did not abolish their employee status under the Code.

In summary it becomes thus obvious that the most interesting provision under the Code as regards discrimination is section 136.1, the duty of fair representation.

It must be recalled that this concept was stumbled into initially in the United States by the National Labour Relations Board at the occasion of the determination of an appropriate unit for collective bargaining purposes where a union was found to have by-laws forbidding it to act for coloured employees.

From there issued a number of cases and principles at these occasions which were slowly and gradually introduced and imposed on unions to guard against discrimination of all types in their representation of employees.

SENIORITY, PROMOTIONS, LAYOFFS AND DISCRIMINATION - A UNION PERSPECTIVE

By
Ed Finn

Two long-established union practices--seniority and fair representation--have come under scrutiny and criticism in the wake of enactment of antidiscrimination laws in the federal and most provincial jurisdictions.

Seniority provisions have been construed as obstructing women and minorities from advancing up the ladder, and also condemning them to be the first casualties of layoffs. The duty of fair representation, which obliges a union to represent all employees in the bargaining unit fairly, can become very difficult when the interests of the majority of the members clash with those of individual members or of a minority. Democracy and majority vote, the usual methods of decision-making in unions, clearly become inappropriate in such circumstances.

Before discussing these problems in more detail, a brief definition of what seniority is, and how it is perceived by unions and employers. Basically, seniority is the device by which the allocation of scarce opportunities is made among workers--who gets the remaining jobs when some are laid off, who receives a promotion when several workers want it, who is called back to work when operations resume after a shutdown, who has first chance at the best shifts or to work overtime, and so on. Seniority is determined by length of service in a bargaining unit.

In general, unions and their members prefer that scarce opportunities be rationed on this basis, though there are some differences of opinion at times about how broadly seniority should be exercised. Managers, on the other hand, though they agree that length of service should be a factor, would prefer that scarce opportunities be allocated primarily, if not solely, on the basis of superior ability. The trouble with that method, from a union standpoint, is that ability is often judged more by subjective than objective criteria. And what happens when two or more candidates are equally proficient?

No union insists on a strict observance of seniority where the senior candidate is obviously not qualified. Most seniority clauses in collective agreements state that seniority will apply in promotions and transfers only when those workers affected are all capable of filling the job.

The seniority system is viewed by unions as the best way of preventing favouritism, discrimination and unfair treatment. Older workers are considered entitled to such preference because they have

demonstrated their skill for the longest period; because long service should be rewarded; because it sets up a single standard easily understood and applied; and because it reduces the number of grievances that arise over layoffs and promotions.

The seniority system has been accused of causing much resentment among younger workers, who have to wait years longer than they otherwise might to rise into better-paid jobs. That may be true. But I suggest that a great deal more resentment would be caused if older workers were passed up in promotion, or if they were laid off while workers with less seniority were kept on. Such a system, in which favouritism and prejudice would be widely imputed, if not actually practiced, would be a sure way to demoralize the whole work force.

Although it elevates length of service above all other considerations, the seniority system does establish some order, and a standard that is easily understood. Certainly it has its flaws, its drawbacks. But I have yet to see any better system proposed that would not, in effect, give management the right to decide unilaterally who gets promoted, demoted, or laid off.

Having made this defence of the seniority system, as a general principle, let me hasten to concede that, although its intent is not to discriminate--except, perhaps on the basis of age--it can sometimes have that effect.

In some industries, for example, instead of one or two broad seniority groups, there are a dozen or more, with different classifications of workers, each segregated in its own enclave. There may be some justification for this, in cases where jobs differ radically in the skills required and where there would be little or no transfers between them, anyway. But in other cases the fragmentation seems to be arbitrary, and has the effect of restricting access to the better-paid jobs.

Such compartmentalization of jobs also makes it easier for employers to discriminate against women and minorities, by confining them in job ghettos that the seniority system then prevents them from escaping.

Even when seniority is plant-wide, or industry-wide, it can be used to perpetuate the effects of discriminatory practices, even after such practices are abandoned. If, for example, an employer has only in recent years started hiring proportional numbers of women and members of minorities, the seniority system would still deny them access to the higher-paid jobs through the usual order or progression, and would leave them most vulnerable to losing their jobs through layoffs.

In such cases, the union is caught in the middle, between the effects of the employer's previous discriminatory hiring practices, and the effects of the seniority system itself. On the one hand, both the

human rights laws and the union members who have suffered from discrimination in the past put pressure on the union to correct these injustices. On the other hand, the majority of the union's members, who have already built up seniority, argue that they should not be penalized because of something the employer did.

This argument is not available to the unions in the construction and marine industries, who in effect choose their own members through the hiring hall system. In the United States, many of these craft unions have been found guilty of discriminating directly against women and minorities in their selection of workers for hiring by employers, as well as for apprenticeship positions. Some American craft unions have even been found to discriminate in their membership admission practices.

I don't know to what extent, if any, this form of direct discrimination is practised by construction unions in Canada. It may be that, because our minorities are not as large and well organized as they are in the U.S., because our antidiscrimination laws have few teeth in them, and because so few women seem to want to become carpenters or bricklayers, the issue has not really been investigated in Canada. At the risk of being labelled a national--if not a male chauvinist--I would be surprised if it were found that craft unions in Canada were guilty of much in the way of overt discrimination. But, if they are, I would suggest that those discriminated against, or someone acting on their behalf, lodge protests under either the human rights acts or the labour codes, or both.

I made the point, at an earlier seminar on this subject here at McMaster, that it is unrealistic to expect industrial unions to act unilaterally to correct the unfair effects on women and minorities of discriminatory employment policies. What is required is affirmative action of some kind, to break down seniority barriers, to give women and minority employees retroactive seniority credit, and even, if necessary, to set firm quotas on the numbers of women and minorities that should be hired for various jobs. The democratic process of trade unionism, based as it is on majority rule, is ill-suited for such drastic remedial measures. The unions' constitutions were not designed for that purpose, and their voting procedures tend to confirm the status quo, if that is what the majority of members are satisfied with.

One of the most serious problems now confronting unions in this country is how best to reconcile the interests of various component groups of members, when those interests diverge or conflict. And there is conflict between such groups--between younger and older workers, between the skilled and unskilled, between the high-paid and the low-paid, between those in different parts of the country, and yes, between the male and the female union members.

These internal clashes are most pronounced in unions with a diversified membership, where many different classification of workers are covered by the same contract and the same seniority provisions. Is it discrimination, for example, when the younger workers outnumber the

older ones and vote down any effort by the union to improve pensions, as desired by the older workers? Is it discrimination, when the union repeatedly negotiates the same percentage wage increases for all its members, thereby widening the income gap between the higher and the lower-paid members? Is it discrimination when a union with nation-wide contracts negotiates the same wage rate for members in all parts of the country, despite demands from a minority in the high-wage, high-cost regions that they should get higher regional rates?

These are all situations that I have witnessed personally, and I mention them to show how difficult it is for unions to follow policies and actions that are fair to all its subgroupings of members, whether by age, skill, sex, location, or length of service. If a union neglects the needs of its minority of female members for such things as day-care and better maternity leave, it's not normally because of sexism or prejudice. It's because, as in all democratic institutions, the precept of the greatest good for the greatest number, dictated by the vote of that greatest number, can leave the minority out in the cold.

The same applies to the duty of fair representation which has been imposed on unions by the federal and some provincial labour codes. It is based on the principle that the union must represent each individual member equally fairly and effectively. But unions are designed for collective action. They exist because most workers prefer to be part of a larger organization and to be represented as a group, rather than take their chances with their employer as individuals. To function at all, a union has to try to accommodate all those individual interests and wishes, to work out compromises and trade-offs between them, and somehow arrive at policies and practices that are acceptable and fair to the largest possible number of members.

What disturbs me about the concept of fair representation is that, carried to its logical extreme, it would require a union to satisfy every member individually. I don't know of any system, democratic or otherwise, that could accomplish that. Of course, where there is blatant neglect of the legitimate needs of one or more members, a union should be brought to task. Where there is clearly bad faith or discrimination in dealing with a claim or complaint by a member, - and this may happen once in a while, - again a union should be compelled to make restitution. I would hope, however, that those who enforce such laws would do so with some understanding of what is feasible and desirable, particularly for unions that represent large and diversified groups of members.

With that proviso, I'm all in favour of more assertive, more direct affirmative action programs to correct discrimination in employment, and specifically to cut through the legalistic barricades that seniority restrictions in some industries now put in the way of remedial efforts. I am not at all impressed with the decision in Canada to attempt to implement equal rights by conciliation and persuasion, in preference to the decision in the United States to enact strong laws

enforceable by the courts. In my opinion, most employers will ignore laws that have no teeth in them, and most unions, though they will agree with the intent, will hesitate to tackle the powerful majority vested interests within their memberships.

I shouldn't generalize, of course. A few companies--perhaps a dozen or more--have voluntarily introduced affirmative action programs, and special training courses for women and minorities, and are doing all they can to eradicate every last vestige of discrimination from their workplaces.

Within the labour movement, too, there has been a growing awareness of the problem of employment and pay discrimination. The Canadian Labour Congress, and some of its affiliates notably the Canadian Union of Public Employees, have gone beyond the holding of meetings and the passing of pro-equal-rights resolutions to actively pursue this objective--by lobbying governments, by assisting aggrieved workers to file complaints, and even by making equal pay and equal rights priority issues at the bargaining table.

Such corporations and unions, however, are still the rare exceptions. It is no coincidence, either, that CUPE and other unions that are most active in seeking fair treatment for women are the unions with the largest number of female members. That is not to belittle their efforts in any way; it is simply to observe that it becomes progressively easier for a union's leaders to get serious about equal rights for women as their percentage of female members increases.

As for the employers, most of them look upon equal rights and antidiscrimination laws as restrictions on their managerial prerogatives--and potentially costly restrictions, at that. The correction of past injustice, particularly if it involves upgrading jobs and pay rates, and even making large retroactive payments, can put quite a dent in a company's treasury. So it is not surprising that, in the United States, it has been necessary not just to enact laws against workplace discrimination, but to use the courts to make sure the laws are obeyed.

Several big corporations in the U.S., as we know, have been socked with multimillion-dollar court rulings, and have been forced to reform their hiring and pay practices. Some American unions have been forced, by seniority-override orders by the courts, to revise their seniority lists and move more women and members of minorities up into positions that give them more job security and make them eligible for better-paid jobs.

We Canadians seem to think that our corporations and unions don't need that kind of arm-twisting to do the right thing by our women and minorities. We think they'll be converted on the road to Damascus and voluntarily launch into a campaign to make Canada a land of equal pay and opportunities. All that's required, we assume, is the occasional bit of persuasion, and the occasional conference like this one.

If that were the case, we wouldn't need any human rights commissions, or any antidiscrimination legislation. We could just sit back and wait for those who have practiced discrimination, or who have acquiesced in it, to see the light and mend their ways.

Well, I don't think that's going to happen, unless our human rights laws are as vigorously enforced as those in the U.S. have been. And it's not because our corporations and unions are ideologically opposed to this kind of reform. In theory they're all for it. But they are locked into traditions and practices that have built up strong vested interests, that have been rigidified by seniority rules, and that require a great upheaval, and often steep costs, to bring about the necessary changes. There is nothing as difficult to change as organizational rules and practices, in the absence of a strong external stimulus.

We should keep in mind, too, that, although this issue is important, it is one of many issues and problems facing union leaders and business executives. Not too many of them get up in the morning wondering what they can do that day to advance human rights and eliminate discriminatory practices. Not because they are indifferent to them, but simply because there are more pressing matters on their agendas--not more important matters, perhaps, but more immediate, more visible, more demanding.

Which is just another way of saying, I suppose, that it's the squeaking wheel that get the grease. Business and labour leaders are continually applying grease to the squeaking wheels in their organizational machinery, and those wheels that don't squeak get scant attention. There was some noise and pressure about discrimination in the workplace when our human rights acts were passed and our human rights commissions set up; but, apart from occasional conferences like this one, much of the pressure has now subsided. I realize that the human rights commissions are quite busy processing individual complaints, and have succeeded in redressing cases of unjust treatment in various plants and offices. But I suggest that this is like trying to move a mountain with a teaspoon. It still leaves the vast promontory of prejudice and discrimination virtually intact.

So I reiterate that what is needed, in my view, is a serious and strongly enforced attack on workplace injustice, along the lines of the U.S. experience. First of all, because, like the mythical donkey, it sometimes takes a hammer-blow on the head to get attention. Secondly, because the inertia that grips most business organizations will only respond to a sharp impetus from outside. Thirdly, because the unions' democratic process, when it reinforces or perpetuates inequality, must be superseded by legislative fiat. And fourthly, because, human nature being what it is, people have to be convinced that change will be imposed on them if they don't embrace it willingly.

That last point is important. If company managers feel secure in continuing unfair practices until an aggrieved employee complains to the human rights commission, and, even then, if remedial measures apply only to that individual, they will feel little incentive to reform. If union leaders are not able to say to their members, "look, we're going to have to change our seniority system to make it more equitable, or the government or the courts will step in and force us to do it," then they will have no lever to use to sway the majority of their members who now benefit from such a system.

I suggest that a crackdown of the sort I favour would not have to be pursued very far before the message got across to the nation's employers and unions that our governments and human rights commissions are serious in their campaign to remove workplace discrimination. After two or three offenders were brought to task and forced to scrap inequitable practices, at whatever trouble or expense, then--and only then--would you see a scramble by other employers and unions to tackle the difficult, messy and contentious task of rooting out discriminatory methods and practices in their operations.

I don't advocate tougher and more severely enforced laws because I have any philosophical preference to them over the persuasive approach. It's just that like it or not, there are situations where, with the best intentions in the world, conciliation and persuasion will not work--and this, in my view, is one of them.

SENIORITY, PROMOTIONS AND LAYOFFS - AN EMPLOYER PERSPECTIVE

By
Francis Folz

When the employer considers the specific notions of promotion and layoff, it is generally in the context of the merit principle. Thus hiring, promotions and layoffs will be based on the skill, knowledge and ability required for the job in question, or as the law puts it, on bona fide (genuine) occupational qualifications. Seniority, i.e., length of experience, becomes the tie breaker when the occupational qualifications of the workers affected are equal.

Seniority and Layoff

In practice seniority becomes an issue when the rights of employees in the bargaining unit conflict with the rights of minorities and women. The problem seems to consist in the fact that when the rule of seniority is applied (first person in - last person out) the result is a freezing of the status quo. Hence new presences in the work force which reflect new social trends are eliminated in the situation of economic decline and fiscal restraint.

This is what seems to be happining in many sectors whose employment patterns reflected the changes in the Immigration Act of 1962 and 1967. This legislation in effect encouraged multiracial immigration patterns with strong response from the West Indies and the Indian subcontinent. In the late 1970s the economic downtrend with resulting layoffs can be foreseen to have a definite impact on race in the workplace.

Let me offer one example to illustrate: The Toronto Board of Education's task force report on declining enrolments states that the Board is "faced with an actual and projected decline of 32 000 students in fifteen years (1967-1982)."

The implications of enrolment decline on staff allocation are interesting. The Board "can expect an approximate reduction of 840 positions over the next five years. Other things being equal, an annual attrition rate of between 4 or 5 per cent would be required to absorb these positions without laying off teachers. The attrition rate for 1977-78 was 2.1 per cent." Applying the rules of seniority in this situation it is likely that a large majority of visible minority teachers will be declared surplus as the system shrinks. One can appreciate the role model implications of the loss of a significant number of minority teachers to a system where in 1975, 30 per cent of the students were not Canadian born and 46 per cent whose first language was not English.

Another direct result of the application of the seniority rule in the education field is that the situation of declining enrolments has to do with age. If the projections are valid, by 1984 there will be few teachers in the elementary or secondary panels under the age of 35.

Another reality which can have a disparate effect on the employment of minorities and women is departmental seniority. I recall investigating the case of an unscrupulous employer who resisted the attempt of the workers to replace the bargaining agent. In this case the majority of the workers were male visible minorities whose grievances and complaints were not satisfactorily attended to by the local union. When efforts were made to replace the bargaining agent, the leaders were transferred to a newly created department and later laid off when work in the new department suddenly evaporated.

As mentioned earlier, seniority becomes an issue when the rights of members of the bargaining unit conflict with the rights of minorities and women. It is a problem that still seeks a satisfactory solution.

One solution which has received the repeated approval of the courts in the U.S. is a little wrinkle called the "affirmative action override." The override is the brainchild of Labour's chief negotiator, William J. Kilberg. Under its terms, the American Telephone and Telegraph Company became obliged to override the provisions of the union contract to promote a "basically qualified minority person rather than the person "best qualified." The court decisions on the matter were expressed by Judge Higginbotham who produced an opinion in 1976 that granted seniority the status of a privilege rather than a right. Privileges based on seniority, he said, had not acquired "the status of constitutional rights and must be held secondary in importance to the implementation of a significant national policy, the assurance of equality of employment opportunity."

Another approach to the seniority problem is found in the celebrated Weber case, which takes up a white worker's complaint that he was illegally discriminated against when he was denied a spot in a quota-based training program at Kaiser Aluminum while Black co-workers with less seniority were accepted. The courts disagreed with the complaint stating that the program was acceptable because both Kaiser and the United Steelworkers had voluntarily agreed to suspend seniority with respect to admission to the training program.

More creative solutions to the layoff/seniority question are needed which take into consideration the quality of the relationship between the worker and the work situation. I can see a process developing in which management and labour recognize each other as partners and act as such.

Promotion:

The quality of working life is a good starting point for the discussion on promotion. For our purposes today I am going to choose an example which has bearing on sex equality in the place of employment.

The opinion is being advanced in some circles that the negative reality of a promotion is becoming a real concern for people making advanced career decisions. Interest is being placed on the quality of working life rather than the status or remuneration aspects of a position. Some people are advancing this as one of the reasons for the scarcity of women principals in public school systems, or in senior positions in corporate management.

Be that as it may there is plenty of evidence that other factors influence the scarcity of promotable women. Carol Reich who researched "the effect of a teacher's sex on career development" uncovered limitations in advancement due to sex all along the path of career development:

> Sex, first of all, affects the accumulation of paper credentials (degrees and experience) and then job performance. Sex influences the degree of encouragement a woman receives to apply for promotion, the number of applications she will actually make. Finally, sex influences the likelihood of her being promoted. All of these effects due to sex, considered singly, are relatively small. However, sex operates at all points in the development of a teacher's career, and the effects are, therefore, cumulative.

What Reich demonstrates as true with regard to women in education, others have supported in the corporate sector. As Katharine Graham, whose company owns both the Washington Post and Newsweek, states in Fortune magazine "Women aren't a minority, but they are in the business world. Their expectations haven't been there as long as men's have." As for management, she says "there is still prejudice on the part of men, everywhere. Its in our society, in ourselves - in women themselves. You can't break this up overnight, particularly because of the first problem: how many trained, able women are there now?

WHAT CAN BE DONE?

The disadvantages found by "minorities," including women, do not begin when an individual applies for a job or wishes to be a candidate for a promotion. These barriers begin in the home, the school and the playground. They grow out of a complex array of social values and habits which no corporate policy and no law can change by itself.

While no organization can stray too far from community consensus, management and administration can choose to be in the vanguard of social change or eventually be forced to comply with new social norms. How can management accelerate the process of equality of opportunity? I suggest that this problem should be viewed like any other management problem and apply proven managerial skills and techniques.

If we know that the representation of a particular group is below what it should be, changes must be introduced. How this should be done is a matter of much debate especially here in Canada. Neither employers nor unions subscribe to the measurement concept in any form and employers in particular consider fixed targets as positively dangerous. They create pressures towards tokenism, quotas, reverse discrimination and erosion of incentives for superior performance. Attention must be focused on the real objective -- equality of opportunity. This is not to be confused with equality of result.

Accentuating the opportunity concept really places the control and direction of career activities in the worker's own hands. For example: roughly 51 per cent of the population are women. If every person in the population wished to have a life-time career in business or education, and discrimination disappeared entirely, then the chances are that every job classification would have roughly half men and half women. However not everyone wants to be placed in a Procrustean bed. Not everyone is career minded nor does everyone have the same life aspiration. Hence, the setting of a target of having a half and half representation in each job category naturally receives resistence from all quarters.

The crucial objective then is to remove unfair and discriminatory barriers so that each person has the freedom to advance according to his or her wishes depending on the person's energy, skill, knowledge and ability. What this is really all about is the freedom for individuals to choose, to be liberated in their own way.

This means the development of structures of opportunity:

(a) Better mechanisms to ensure that promising individuals are not overlooked in promotion

(b) Self nomination programs for skill development

(c) Better communication procedures for positions available

(d) Career and life planning workshops to assist employees identify transferable skills.

The Women's Bureau of the Ministry of Labour is presently providing a consulting service on an ongoing basis to about 120 Ontario employers and over 350 more have been in contact with the Bureau. The women's studies program, operative in the public school systems throughout the province, is dealing with sex-role stereotyping

directly. The Toronto Board of Education has undertaken a critical review of curriculum materials now in use in order to identify materials which contain racial/ethnic bias and prejudice and to integrate this process with other processes to do with sex bias, class bias and other forms of bias.

These are hopeful signs of the changes in attitude that the workplace can expect in the future. I am certain that we who have initiated the process of social change will be succeeded by our children who will generate more creative and wholistic responses to the crippling realities of racism and sexism.

SENIORITY, PROMOTION AND LAYOFF IN RELATION TO RACE AND SEX

By
Bromley Armstrong

Since the Ontario Human Rights Code was enacted in 1962, the Ontario Human Rights Commission has taken many significant strides in reducing discrimination and in promoting the principle of equal opportunity in employment. However, much work remains to be done.

Our experience is that the most pervasive discrimination often results from seemingly neutral practices which nonetheless perpetuate the effect of past discrimination. Historical patterns have developed which discourage and prevent minorities and women from assuming their full participation in all levels and areas of the workplace. For example, requiring a university degree for a job when, in fact, it is unrelated to the nature of the job, would restrict many native people from applying for the job because the social system has historically restricted his or her access to educational opportunities. Similarly, a woman with excellent educational qualifications may be rejected from a job because of insufficient job experience in a field where women have historically been denied jobs.

The Ontario Human Rights Code, section 41(a)(b)(c) and (e) states:

> No person shall:
>
> (a) refuse to refer or to recruit any person for employment,
>
> (b) dismiss or refuse to employ or to continue to employ any person,
>
> (c) refuse to train, promote or transfer any employee,
>
> (e) establish or maintain any employment classification or category that by its description or operation excludes any person from employment or continued employment because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin of such persons or employees.

All of the antidiscrimination statutes in Canada specify that in the field of employment an employer may not refuse to employ or continue to employ or refer or recruit any person or refuse to train, promote or transfer any employee because of sex or colour, etc.

All antidiscrimination statutes provide that the trade unions or professional associations shall not exclude from its membership or expel or suspend any member because of race or sex or any of the prohibited grounds as stated in the prescribed codes.

Seniority as outlined in most collective agreements is the principle of granting preferences to full time employees in matters of promotion, demotion due to reduction in staff, layoff, or recall after layoff in accordance with the length of continuous employment, provided the senior employee has the necessary ability to perform the requirements of the job in a competent manner.

Seniority is generally based on the length of continuous service with a given company. Seniority is sometimes considered on a unit-wide or, as stated in some agreements, on a plant-wide basis. Some companies may operate on what is known as channel seniority. In some collective agreements provisions are made for separate seniority lists for production workers, skilled tradesmen and maintenance staff. Plant-wide seniority calculating length of service should be applied in determining preference for promotions, transfers, demotions, layoffs and recalls. It could be defined as plant-wide seniority in job groups of occupational classifications.

In a company (a), for example, where there may be a number of job classifications, employees with say, six years seniority, could be laid off while an employee with less seniority is retained, the reason being that plant-wide seniority may only apply to a specific job classification or you may, for example, be an employee in a plant (a) or a given department, with six years seniority, and the layoff takes effect within that department and not in another department where employees of the company may have less seniority and would not be affected by such layoffs. Another example - channel seniority in job classifications (a) to (d) - that is seniority would apply within these classifications or departments (a)(b)(c)(d). So in cases of layoffs, seniority would only be effective within that group of departments, which would be a limited group similar to the department seniority requirements.

One case study showed that in a factory with a large number of blacks and south Asian workers, as well as east coast Canadians - some of which are also black, all the supervisory personnel were white. Many foremen were east coast Canadians or whites who were employed within the company and favoured. They were given promotions and the south Asians and blacks tried unsuccessfully to form a union. The management would layoff those people who got involved in trying to organize the union, and invariably it was always the non-whites that were laid off without regard for seniority. The same is true with regard to female workers. This case was referred to the Labour Relations Board and the workers who were laid off were reinstated.

There are cases on record where in a specific plant a job became available where parts control and stacking were involved. A female employee with the highest seniority applied for the job, and this job was denied to this employee because it was alleged that she was unable to lift the cartons above her head to place them on the shelves required for storage of the parts. The most significant factor in the storage of parts was that the heavier parts were placed on the

highest shelf while the small parts were easily accessible on the lower bin that went from the ground up to six feet, and one had to climb on a ladder or metal stool to place the heavier material some six feet to eight feet from the ground. This case is under investigation and the Commission feels confident in bringing about a satisfactory settlement.

I have also discovered a number of examples of discriminatory practices relating to jobs, a manufacturing company, for example. A Black employee with five years seniority applied for a welding position only to find out three months later that the application he filed for a transfer could not be found. Following a month of discussion with the union involved in that particular plant, the employee was told that Blacks were not hired as welders and that he should stick to his position as an assembler. The employee resigned his position and became an insurance agent.

There is also the case of two Black women who applied for positions as dietitians in a hospital. The first who applied delivered her application for employment to the personnel office. On enquiring three months later, she found that her application was not on file. She was invited to submit a second application, which she did and delivered it by hand. A month later she discovered that this application could not be found. She was again invited to come in and fill out another application and to have an interview with the personnel manager. The personnel officer upon discovering that she was Black refused the interview, told her to leave the application and she would hear from the hospital. She did not hear anything further and filed a complaint with the Ontario Human Rights Commission who was able to get a satisfactory settlement in that particular case.

The second applicant, another black female, encountered the same[1] problem with the Toronto General Hospital. This case was taken to a board of enquiry where the hospital was found guilty of the allegations of discrimination, and they were ordered to pay the complainant the sum of $1 700 by way of compensation for general damages suffered by way of humiliation, injury to feelings and dignity caused by the act of discrimination.

Another case handled by the Ontario Human Rights Commission involving a local union - back in 1978 where a union of journeymen and apprentices of the plumbers and pipefitters industry refused employment to six Black welders and steamfitters. This was a U.S. company with a job in Ontario where six complainants tried to obtain employment on this particular project and were refused. This case was taken to a board of enquiry where the board's chairman, Professor H.W. Arthurs, made his direction that the complainants should be compensated for time

---

[1] In the Matter of The Ontario Human Rights Code R.S.O. 1970, C318 as Amended Board Chairman N.S. Tarnopolsky Oct. 14. Re. Morgan V. Toronto General Hospital 1977.

lost. The complainants[2] involved received a sum of over $6 000 each in compensation and, four received the sum of over $4 000 each in compensation. The local union was also required to give letters of assurances to the Ontario Human Rights Commission indicating their policy of nondiscrimination in the placement of future workers.

I'll read you a few paragraphs from the letter sent on behalf of the local union to the Commission which states, and I quote:

> This incident has given the union serious concern, not only because it is a declared policy of this local to abide by the Ontario Human Rights Code, but because we find discrimination of any sort to be repugnant to the very principles of trade unionism. We have undertaken to ensure that all members will be treated fairly without regard to race, creed, colour, nationality, ancestry, place of origin or age, we recognize that the primary consideration in membership, job referral and employment are the qualifications and ability to perform the work in question. The local maintains this policy, not only because it is the law, but also because we consider it to be vital to the development of a healthy economy and society. In settlement of the particular complaint, we have entered into a memorandum of agreement with the Ontario Human Rights Commission and the company which is designed to reimburse the six complainants for financial loss incurred as a result of this incident, and to ensure that there is no repetition of the kind of difficulties encountered by them, and involved in the company and this local union.

Another example of sex discrimination: at a trade show with goods on display where male participants with displays at retail outlets were given credit, and female participants wetting up displays at various outlets were denied the same credit afforded males. On a particular occasion - a gift show in 1978 - the male salesmen would ridicule and make jokes of a white female of German ancestry calling her Nazi Kraut, S.S., etc. She brought this to the Commission's attention when some of her accounts were taken away and given to a male salesman, and she was eventually dismissed. She alleged discriminatory dismissal. The case was satisfactorily settled and she was returned to work and the company offered compensation of $4 000 the amount she lost during the period of her dismissal. She accepted.

There are several incidents of black workers who complained that they were required to work harder than other workers. For example, in a factory we had a line of workers dismissed - 32 workers

---

[2]In The Matter of The Ontario Human Rights Code, 1961-1962 Board Chairman Professor H.W. Arthurs of the United Association of Journeymen and Apprentices and Stanley Williams V. Local 46
Re. Owen Barnes, Arnold Blair, Joseph Nesbett, Herbert Telphia, Gifford Walker.

of which 24 were blacks, 7 south Asians and one South American. The company alleged that they did not keep up to production standards. This case was taken before a board of enquiry and it was settled to the satisfaction of the Commission, and the complainants who received a sum of approximately $1 700 each for loss of wages for the period before the settlement was reached.

There is no doubt in the minds of the Commission, or the commissioners, that discriminatory practices are being used by some employers to deny upgrading and training to women and members of the visible minorities. This relates directly to hiring practices of some employers. Women, in a number of examples, make up more than 50 per cent of the work force and still find themselves in low-paying jobs and not in middle management or management positions. The average female worker's income is only 55 per cent of the average male worker's income. The hotel restaurant industry is an outstanding example. A recent study conducted on behalf of the Ontario Human Rights Commission reveals[3] that most hotels hired males in management positions and as waiters in their dining rooms only for their first class restaurants. Hostesses were only employed in a few cases in the coffee shops. It was also observed that the degree of skill involved was quite different in some of the restaurants as it related to the volume of work. The maitre d', for example, requires special skills for service in first class hotels and these skills are taught to waiters on the job, depriving waitresses of the same opportunity for upgrading because most women were employed in the coffee shops and had little opportunity for this type of advancement. This study showed that waiters earned more than waitresses earned a day in tips. They were unable, however, to include the cost of meals involved. It is assumed that the meals in a coffee shop were far less expensive than the meals served by the waiters in the dining rooms, and they would definitely receive higher tips and gratuities than their female counterparts. The question brought up most frequently, as it relates to women, was that of French service which is traditionally performed by males. There are very few females who perform this service in any of the top restaurants or hotel restaurants. Some managers tell us that the reason for this is that the customers prefer males, and there are no qualified females to perform this type of service, and that women applicants are most interested in cocktail waitressing which is very lucrative, but not prestigious and does not involve food service training. Women never specifically request positions in dining rooms, but prefer to remain in coffee shops where the work is easier. This is one of the examples of an industry dominated by males with little advancement or opportunities for females to advance to the better jobs or management positions where they could perform on a par with their male counterparts.

---

[3]A Study of Employment Policies in Dining Rooms and Coffee Shops Aug. 15, 1978, Pam McGibbon, Janet McMurtry Students.

The personnel in the hotel studies repeatedly stated that they would hire well qualified and experienced women for their first class restaurants, but they have not developed training programs or made any concerted efforts among their present staff to recruit or train women for this type of work. They gave no explanation as to why the food service training was not available to women, seeing experience was required in their first class restaurants where all the hotel training programs for the top positions were only open to men.

Further Examples Relating to Problems of Women in Employment as it Relates to Seniority

The Commission received a complaint from a woman who alleged that she was hired as a salesperson at a major car dealer, and at the same time a male salesperson was also hired. She received $100 a week, while her male counterpart was paid $150 a week over a three-month period. At the end of three months, the female, although her performance was superior to her male counterpart's, was told that her male colleague who had a poor sales record was still employed by this particular company. This case was settled satisfactorily after conciliation conducted by the Commission.

There was a case of an East Indian woman who was by-passed for a position she was qualified for. This was given to a white worker with less seniority. She was the only visible minority in the company. The job, incidentally, was given to a white male. This was also investigated by the Commission, and the Commission received assurance after settlement of a nondiscriminatory policy in the future.

Another complainant, a female painter, was invited to try out as a sign painter, but she was refused this opportunity when the company representative discovered she was a female. The manager said he had never seen any woman good enough to do sign painting. They only hired women as receptionists. After an investigation by the Commission, this case was also settled. The complainant was a trainee and unable to meet the company standards.

An example of where seniority affected people from the visible minority community. In the early 70s in Toronto, the Black carpenters who were members of the Carpenters' Union complained bitterly about discrimination and lack of job opportunities because of their race. The practice of the Carpenters' Union was to send perspective union members to job sites when there were vacancies available at the job site that they control. It so happened that in most of the instances the foreman on the job site would be an Anglo Saxon or an eastern European, and when the Black carpenters were sent out to the job site, they would be told that there were no jobs available. More than half of the Black members of the Carpenters' Union got together and formed The Black Carpenters' Union. They approached the Human Rights Commission who initiated meetings with the Ontario Federation of Labour and the Carpenters' Union in order to make changes in the

placement of union workers. This matter was resolved, and eventually the members who formed the Black Carpenters' Union found steady employment and the Black Carpenters' Union disbanded.

With the types of examples already given there should be no hesitation in saying that discrimination on the basis of sex and race as it pertains to seniority exists. The question is how do we deal with this problem. We may suggest that community groups or the Ontario Human Rights Commission should be more vigilant to ensure that the women, and people from the visible minorities, receive equal opportunities in the workplace.

But the formula for ensuring equal opportunity is yet to be devised. How best to cope with a growing problem. One of the suggestions I would like to put forward would be that the community organizations, whether they be women's organizations or minority community organizations, should from time to time do studies and conduct test cases to determine how their groups are affected, and the findings should be brought to the attention of the Commission. The Commission should be urged to take positive steps to eliminate any inequality brought to their attention. My second suggestion would be the question of the Ontario Human Rights Commission thinking in the terms of affirmative action programs in hiring, training and upgrading.

My third point, or suggestion, would be that a very serious look should be taken at the labour movement itself, and they should be encouraged to include on their executive and bargaining committees women and members of visible minorities, and where it is shown that women and minorities constitute a large percentage of a membership, every effort should be made to have participation by women and people from the minorities.

One of the questions we have been faced with over the years is that of finding suitable candidates for job placement or upgrading, but there is no doubt in my mind that candidates are readily available if the opportunities for placement or advancement are made available. The question of women receiving their rightful places in the work force has been denied them for too long. Blacks have been saying they're the last hired and the first fired. This is because of seniority provisions where they are sometimes the last hired, and because of lack of opportunity and advancement they have to be the first fired. Unfortunately, women are in a similar position to those people from the visible minority.

At the present time, the Commission has the authority to approve special employment programs of affirmative action designed to assist groups that have traditionally been denied employment opportunities. From time to time the Commission has approved such affirmative action programs that enable qualified or high potential members of minority groups and women to enter the work force in non-traditional job areas.

The significant feature of affirmative action in Ontario is that it relies on persuasion rather than force. Its preferential concern for minorities and women is not promoted at the expense of discriminating against whites or males. Its purpose is to maintain the merit principle, yet at the same time widen the number of candidates for jobs by including minorities and women who are presently qualified and by upgrading their training when necessary. This policy should benefit our society and economy by tapping the contributions, talents and potential of all people in this province.

ADDRESS BY

Peter C. Robertson

Former Director, Office of Policy Implementation

U.S. Equal Employment Opportunity Commission

"I Recommend an 'Industrial Relations' Approach to Race and Sex Equality in The Workplace"

It is a pleasure to be here in Canada today and join in the deliberations of the Industrial Relations Research Association on the topic of "Race and Sex Equality in the Workplace: A Challenge and an Opportunity."

As you were told in that very kind introduction I have been involved in the administration and enforcement of antidiscrimination legislation in the U.S. in a number of capacities for 16 years -- first with the Missouri State Commission on Human Rights and later with the Federal Equal Employment Opportunity Commission. Apparently, Professor Jain seems to believe that there may be some learning in those experiences that I can share with my colleagues here in Canada and that might be useful to you as you contemplate the appropriate approach to dealing with related issues here.

I will take my theme today, Professor Jain, from the title of your organization. For me, it is appropriate that these discussions about future challenges and opportunities for Canada in attempting to achieve race and sex equality in the workplace are being held by the Industrial Relations Research Association, for the most important single thought in my mind about the U.S. experience has to do with the evolution of our thinking about the problem which confronts us when we deal with race and sex equality in the workplace -- from thinking about it as a human relations problem to thinking about it as an industrial relations problem. When the American antidiscrimination legislation was first enacted -- initially at the State level beginning as early as the mid-1940s, and subsequently Title VII of the Civil Rights Act of 1964 -- we in the United States thought about our problems of sex and race equality in the workplace primarily as a human relations issue. Many of the early agencies established to deal with the problem were called Human Relations Commissions which reflected this perception of the challenge that confronted us. While there is still an obvious human relations dimension to this issue I believe the process by which we have shifted our focus in the workplace to an industrial relations approach is one which has the greatest potential for success in dealing with the underlying problem in the long run.

I would like to talk today about what went into that evolution and suggest that, if one is considering a law enforcement approach to dealing with the problem of race and sex equality in the workplace, one will confront a four-stage process for the effective implementation of the law. It will be obvious, as I talk, that my bias is in favor of a law enforcement approach, but in favor of an approach which uses law enforcement ultimately as a "weapon" to achieve extensive voluntary compliance. Inherent in that bias is the very strong belief that a voluntary compliance or human relations approach has failed in the United States and probably will fail in most industrial relations contexts. While it may sound contradictory I do, however, believe that the ultimate goal of a strong enforcement program is to achieve that voluntary compliance by the managers of industrial relations systems which alone can achieve the kind of change which is necessary to implement true equality.

I think we have gone through four stages in the U.S. in our efforts to effectively implement equality in the workplace through the use of an antidiscrimination enforcement mechanism. I will suggest, in passing, that probably the effective implementation and administration of any regulatory statute will have to go through these same four stages -- but that broader generalization from my specific experience will have to await development and elaboration in some other context.

Stage #I - Procedure

New statutes are exciting things to those who propose, support and administer them. There is usually a major problem perceived somewhere in the economic or social system of a city, State, county, province or nation and those who are concerned about that problem put a lot of energy into persuading a legislature to pass a law confronting it. Certain conduct is defined as illegal and a new agency is created to enforce the prohibition against that conduct.

The new administrators of that new agency come in with a strong mandate to do something. They are concerned with eliminating water pollution, air pollution, highway deaths, workplace hazards, or employment discrimination. They devote their early efforts to renting space, hiring staff, issuing procedural regulations, and beginning to define the scope of the substantive problem which confronts them.

If they do an effective job it is totally and completely predictable that the first stage in the evolution of the effective implementation of the law that has been assigned to them will be a legal battle dealing with the scope of the agency's powers -- a battle which I would describe as "fighting the procedural battle."

An absolutely essential first stage to the effective administration of any administrative statute in which an agency is given power to regulate the conduct of some significant economic or social institution is contained within this phrasing. At least, in the U.S., those of us who go to law school and take courses in administrative law are trained to frustrate the efforts of administrative regulatory agencies. Our whole approach is, lamentably, to identifying the various ways in which an administrative agency attempts to regulate can be challenged. Thus, it is totally and completely predictable that an administrative agency commencing its attempts to enforce new legislation will be met at the treshhold by every conceivable attack on its attempts to exercise its powers. Those responsible for the administration of statutes of this type should be aware of the predictability of this phenomenon and should view its occurrence as the first sign of their success rather than (as is so often the case) as an initial sign of failure.

All too often in dealing with State antidiscrimination agencies in the U.S. I have heard Commissioners say "oh we can't do that, we'll be sued" or "well if we do that, we'll have to take them to court to make it stick."

Of course!

Of course they have to go to court. Any new boy on the block has to fight to establish his turf and administrative agencies are no exception.

As I say these words I think back over my own experience with the Missouri Commission on Human Rights and a contrasting experience with EEOC.

When I was with the Missouri Commission on Human Rights we never litigated, for example, to establish the scope of our subpoena power. Whenever an employer, in the course of an investigation, indicated that he or she would not provide certain data which we had demanded we backed off. I can remember discussions at Commission meetings which basically focused on the risk of litigating our subpoena power and the perceived risk that if we litigated and "lost" we would be in worse shape than if we backed down on an individual case. The hypothesis ran that there were a substantial number of employers who were providing us with data and information who if we litigated and lost would no longer provide it. The competing hypothesis that we were "losing" more by consistently pulling our punches and failing to demand data which was absolutely essential to making responsible determinations of the potential existence of discrimination was seldom considered or discussed.

A sharp contrast to this situation was awaiting me when in 1967 I went from Missouri to work with EEOC and rapidly discovered that any time EEOC was challenged, even on the most simple of procedural issues, it stood its ground and litigated. For those who would examine in detail some of the early decisions EEOC made I would recommend them to the writings of my fellow speaker, Prof. Blumrosen, and particularly to his Law Review article on "Administrative Creativity: The First Year of the Equal Employment Opportunity Commission."[1]

For purposes of our discussion here today I will share with you three of the kinds of issues which EEOC litigated so you can get a flavor of what I am talking about:

1. Verification of a Complaint:

Our statute mandates that a complaining party file a verified or notarized complaint. In the early days many of the complaints which EEOC was receiving came in by mail and were not notarized.

This created a problem because the statute also required that complaints be filed within 90 days of the occurrence of the alleged illegal event. Thus, if a complaint was received on the 89th day by the time it was returned to the charging party and notarized it would

---

[1]See: 38 G.W. Law Review 695 (May 1970).

arrive back at EEOC after the expiration of the 90 days and there would be no jurisdiction. Thus, EEOC early adopted the practice of allowing charges to be "perfected." That is, EEOC treated the charge as file when the initial unnotarized or unverified letter was received and utilized that date for the purposes of establishing jurisdiction, and then either returned it to the charging party or arranged for an investigator to have it notarized as part of the first stage of the investigation. Obviously, employers challenged these complaints as lacking in jurisdiction and EEOC litigated and won the right to perfect charges in this fashion and to establish the filing date as the date of receipt of the initial unverified piece of paper.

2. Springing Jurisdiction:

The background of this procedural issue lies in the Federal system in the United States and how Title VII of the Civil Rights Act of 1964 dealt with that system. Specifically, there was a requirement of deference to the State antidiscrimination legislation. EEOC could not process a charge until 60 days after it had been filed with an appropriate State antidiscrimination agency. In the early days EEOC adopted the practice of forwarding the charge to the State agency on behalf of the charging party. That didn't create any problems.

Subsequently, EEOC discovered that many charging parties were failing to file with EEOC on the expiration of the 60 days when Federal jurisdiction could legally be obtained. Thus, EEOC adopted a second practice -- that of automatically considering the charge filed on the expiration of the 60-day deferral period. That did create problems. Employers challenged it and EEOC had to litigate it.

A charge was filed by Mrs. Love against the Pullman Company and EEOC forwarded a copy of the charge to the appropriate State agency. At the end of the 60 days Mrs. Love did nothing, but EEOC treated her charge as if it was filed with EEOC.

Subsequently, and upon the expiration of the appropriate statutory periods, Mrs. Love filed a formal complaint in Federal District Court.

The Pullman Company objected. They could read the statute. The law said that "no charge could be filed" with EEOC until 60 days after it was filed with an appropriate State agency. Thus, they hypothesized that the original piece of paper received by EEOC wasn't a charge and because prior to the expiration of the 60 days Mrs. Love, herself, had done nothing, no charge had been filed with EEOC and there was no jurisdiction. In the case of Love v. Pullman,[2] one of the earliest Title VII cases to reach the Supreme Court, it approved this procedural device of a "springing" jurisdiction as appropriate to the effective administration and enforcement of the statute.

---

[2]Love v. Pullman, ____U.S.____, 92 S. Ct. 616, 2 E.P.D., para 7623 (1972).

3. Scope of Subpoena:

One of the most important powers that any agency has is the right to gather data and information in order to determine whether there has, in fact, been a violation of a statute. Original Title VII gave EEOC the right to issue a "demand" for certain data and information and to enforce that demand in court. In 1972 amendments EEOC was given subpoena power.

Much early EEOC litigation involved the scope of that power. While I have included my discussion of this litigation as part of the "procedural" stage, in fact, it often constitutes the transition from the procedural to the substantive stage.

That is, the statute says that EEOC may demand or subpoena data which is "relevant" to a determination of whether the statute has been violated. When it asks for certain kinds of data and information there must be a legal theory of violation as to which the data would be relevant. If the employer from whom the data is being requested disagrees with that theory he will argue that the data is not "relevant" to a potential violation of the statute and that EEOC should, therefore, be denied access.

All administrative agencies have to go through this stage and litigate to establish their right to gather data and information, as the U.S. Supreme Court -- analysing administrative agencies to Grand Juries -- suggested in the famous Morton Salt case, on a suspicion that the law is being violated or even because they want assurance that it is not.

The outline of what was eventually to become the Griggs or systemic definition of employment discrimination was first sketched out in these early procedural-scope-of-subpoena-cases when EEOC attempted to gather data and information designed to establish that an employer's system had an exclusionary impact on blacks, and employers would resist on the grounds that this was not "relevant" to a Title VII violation. For example, a black would not be hired because he flunked a test and EEOC would subpoena data on the percentage of blacks and whites who had flunked the test. The employer perceiving discrimination as a human relations problem of employer bias or bigotry would deny access to the data on the ground that it was irrelevant. EEOC perceiving discrimination in the form of exclusionary systems which could not be justified believed it was relevant. EEOC litigated and won.[3]

---

[3]An examination of the early failures of the American contract compliance program suggests to me the hypothesis that a failure to litigate these procedural issues was behind some of the early failures and, similarly, litigation of those issues now provides the foundation for some current successes. While the program was initially established in the 1960s it ws only within recent years that the Department of Labor which is responsible for administering that program through its Office of Federal Contract Compliance Programs (OFCCP) began to establish the

Stage #II -- Substance: Nature of Violations

Obviously, the most important stage in the evolution of a law prohibiting certain conduct is the stage at which the precise nature of prohibited conduct is defined. In the U.S. we have gone through an evolution in regard to prohibited conduct which lays the foundation for the industrial relations approach to antidiscrimination legislation.

When the statute was first passed in 1964 most people in the U.S. who thought about the word "discrimination" would focus primarily on its dictionary definition which generally had as synonyms such words as bias, bigotry and prejudice.[4]

In fact, the original version of Title VII of our Civil Rights Act of 1964 was based upon this model and established as the appropriate mechanism for eliminating such bias and bigotry a basic human relations approach. Specifically, a voluntary mechanism of conference, conciliation and persuasion was designed to allow the government to confront what was perceived as an essentially human relations problem and attempt to persuade employers to abandon their biased, bigoted and prejudicial ways.

A second and more sophisticated stage in our perception of employment discrimination involved an examination of treatment which -- while not necessarily based upon bias, bigotry and prejudice -- had as its essential element unequal treatment.

But for purposes of our discussion here today the most important stage in the evolution of our thinking about employment discrimination occurred when we adopted a systemic definition which can best be explained by outlining to you, briefly, the leading American case on the subject.

---

[3](Continued) scope of the program by litigating its powers. For example, see U.S. v. New Orleans Public Service Co., 553 Fed. 2d 459, (197), ___ FEP Cases ____, and U.S. v. Dusguesne Light Co., 423 F., Supp. 507 (W.D. Penn. 1976). For a detailed discussion of the power of the President to regulate the conduct of government contractors through the use of the contracting power see Judge Greene's opinion in _____ v. Uniroyal, ___ FEP Cases ___ (1979), reprinted with OFCCP's Order at 44 Fed. Reg. 45773, 45784 (Aug. 3, 1979), in which Judge Greene affirms the right of OFCCP to cancel and debar Uniroyal from government contracts on procedural grounds. Specifically, without finding that Uniroyal had breached its antidiscrimination and affirmative action requirement the government had taken sanctions against the company purely on procedural grounds for its failure to provide copies of certain documents and provide access to certain employees in the course of an attempt to determine whether there was a violation. Judge Greene approved this.

[4]See for example, Webster's New Collegiate Dictionary, 1975 Edition, which, on p. 326, describes discrimination as involving a "prejudice or prejudicial outlook, action, or treatment."

In the Griggs case[5] the Duke Power Company clearly was not violating the law if you applied either the equal motive or the unequal treatment standard. The Supreme Court found, for example, that not only was there an absence of evil motive there was a specific presence of benevolent motives, for the company had not only abandoned its previous policy of overt racial discrimination but the Supreme Court found specific evidence of a "lack of discriminatory intent" as evidenced by "special efforts to help the undereducated employee [primarily minorities] through company financing of two-thirds of the cost of tuition for high school training." Similarly, the Court found that the challenged practices were equally applied to both blacks and whites.

The Duke Power Company had adopted a high school diploma requirement and a requirement that an employee pass a written test. The impact of those practices on blacks can best be shown by pointing out that 34 per cent of whites finished high school compared with 6 per cent of blacks.[6] The Supreme Court was left to determine whether practices with an exclusionary impact of this nature were illegal in a situation where they were not intentionally adopted to exclude blacks and where they were applied equally to blacks and whites.

In a nutshell, the Supreme Court adopted a business necessity/validation standard for determining the legality of such exclusionary practices.

The concept of validation can best be explained by analyzing the precise nature of the process that is involved when we administer a written test or ask about educational achievement. We have a large group of individuals only a few of whom we can hire. We have no information about those individuals and we seek sufficient information in order to permit us to make a prediction concerning their probable job success.

The concept of validation has to do with the process by which we determine whether we can make such predictions.

---

[5]Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[6]See, Ibid., at footnote 6. The statistics can be summarized as follows:

	Blacks	Whites
Finish High School (1960 N.C. Census)	12%	34%
Pass Wonderlic and Bennet (EEOC Decision)	6%	58%

Specifically, if 100 individuals previously hired have been tested and we have determined that those who did better on the test do better on the job then it is reasonable to state that the test predicts job performance and reasonable to use the test in the future to determine which of 100 new individuals are mostly likely to succeed and should, therefore, be hired.

This process of studying the results of a test and determining whether they correlate with probable job success so that the test can be used to predict probable job success in the future is described as "validating" the test. Actually what is being validated is the hypothesis that the test will predict probable job success.

The concept of "business necessity" is easily understood by a focus of the dictionary definition which for example refers to things "absolutely needed." I often tell new investigators attempting to understand this concept that they should remember that while food is necessary, hamburgers are not. You can always eat hot dogs. Contained in this truism is the analytical fact that something cannot be described as a "necessity" if there is an alternative to meeting the perceived need. Thus, water is absolutely necessary to maintaining life -- there is no alternative and without it we won't survive. Food is absolutely necessary to maintaining life -- there is no alternative to eating and without food we will not survive. On the other hand, hamburgers aren't necessary -- there is an alternative -- you can always eat hot dogs.

This simplistic analysis when applied to the functioning of industrial relations sytems leads inevitably to the "business necessity" analysis.

The Supreme Court in examining the written tests in the Griggs case made it clear that not all tests or employment practices with an exclusionary impact were illegal but that the "touchstone is business necessity." They suggested that:

> If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

This is the essence of the definition of systemic discrimination in the United States today.

It shifts our focus from the intent of the employer to the effect of his practices. Do they "operate to exclude?" Can the employer validate them -- that is, show that they are job related or predict probable job success? And even if they predict probable job success can he show that they meet the business necessity standard -- that is, that there are no other practices which would equally well meet his legitimate business needs without a similar undesirable adverse racial impact?

EEOC was primarily responsible for this evolution in our thinking about discrimination. However, the change in focus was ultimately ratified both by the Congress and the Supreme Court.

To understand this process we must take a quick look at the nature of administrative agencies. Congress perceives a problem: air pollution, water pollution, workplace injuries, or highway deaths; it passes a law prohibiting certain conduct and establishes an administrative agency to enforce the law. One of the first things that the new agency must do is to recognize that the statute usually asks more questions than it answers and that an early step must be the definition of violation of the statute. Air pollution statutes don't state how many parts per million of sulfur dioxide constitute pollution; water pollution statutes don't state how many parts per million of sulfur dioxide constitute water pollution; job safety statutes don't tell you what kinds of helmets to wear; and highway safety statutes don't describe the strength of seat belts. An administrative agency studying the underlying problem which gave rise to the statute in the first place must come up with a responsible definition of violation which will then be reviewed by both the Courts and the Congress to see if it is within the scope of the original delegation from the legislature.

This occurred in the case of Title VII. When EEOC was created and it examined the legislative history of the statute it determined that the major evil toward which Congress directed Title VII was not the bias and bigotry of employers but the unemployment statistics, differential wage rates, and differential job placement for men and women, blacks and whites, etc. These gaps would not be closed by a human relations, sensitivity training, love-thy-neighbor, brotherhood-week approach to employment discrimination and by defining discrimination as bias, bigotry and prejudice which the State antidiscrimination agencies had, at that time, been doing for 20 years without meaningful impact on the underlying problems. It was a gap that would only be closed by examining the systems which gave rise to those statistics and requiring those systems to be changed to eliminate the gap unless the systems could be justified. Thus, EEOC adopted a definition of systemic discrimination which held that an employment system with an exclusionary impact on minorities or women was illegal if it could not be justified by validation business necessity standards.

This view of the statute was ratified by the Supreme Court in the Griggs case which specifically pointed out that EEOC's Guidelines[7] on the subject expressed "the will of Congress" and that it was "inescapable that EEOC's [interpretation of the statute] to require that employment tests be job related comports with Congressional intent."

---

7 EEOC originally issued Guidelines on Employment Testing Procedures on August 24, 1966. By the time the Griggs case reached the Supreme Court EEOC's position had been further elaborated in a new set of Guidelines on Employee Selection Procedures, 29 CFR Sec. 1607,35 F.R. 12333 (Aug. 1, 1970). Since that time an even more sophisticated set of Guidelines with an extensive preamble describing their history has been issued by four U.S. agencies. See: Uniform Guidelines on Employee Selection Procedures (1978), 43 F.R. 38, 290 (Aug. 25, 1978).

This view of systemic discrimination was later to be ratified by the Congress in 1972 when EEOC was given enforcement powers. Congress analysed the history of EEOC's administration of the 1964 statute and determined that the voluntary compliance mechanism based upon a human relations approach which assumed that employers could easily be persuaded to abandon their bigoted ways had failed and that the systemic nature of employment discrimination required that EEOC be given enforcement power. Specifically, they said that because the average employer lacked the "technical perception" to recognize systemic discrimination, he disagreed with EEOC's view that employment systems with an adverse impact must be eliminated if they could not be justified. Therefore, EEOC needed additional enforcement muscle to persuade employers to either justify or change those unnecessary employment systems with an adverse impact.[8]

---

[8]See report of the Senate Committee on Labor and Public Welfare (Senate Report 92-415; Oct. 28, 1971, p. 5; reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, at p. 14, which reads in relevant part as follows:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. It was thought that a scheme that stressed conciliation rather than compulsory processes would be most appropriate for the resolution of this essentially "human" problem, and that litigation would be necessary only on an occasional basis. Experience has shown this view to be false.
>
> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements. In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful. This kind of expertise normally is not found in either the personnel or legal arms of corporations, and the result in terms of conciliations is often an impasse, with the respondent unwilling or unable to understand the problem in the same way that the Commission perceives it.

Stage #III -- Remedies

Once an agency has litigated the basic definition of a violation under its statute and has established the meaning of the underlying legislation it then must turn to developing remedies. That is, if there is a violation of the law what do you have to do about it.

In the United States we have developed three kinds of remedies:

- Make whole remedies for individuals;

- Change or elimination of unnecessary exclusionary systems;

- Numerical remedies.

The make whole and system change approach to remedies were epitomized by the case of Albemarle Paper Co. v. Moody, 422 U.S. 405 (June 25, 1975). The major issues in the case involved allegations of discrimination against Negroes by the plant seniority system and its program of employment testing. The remedy ultimately involved changing the seniority system in order to eliminate its unjustified exclusionary impact and providing back pay for those losses suffered by individual Black charging parties who had been aggrieved by the discriminatory system.

A number of important principles were enunciated by the Supreme Court in the Moody case:

> First, the Court made it clear that "intent" should no more be the standard in framing a remedy than it should be in establishing a violation. Specifically, the Albemarle Paper Company argued that when Title VII was first passed no one

---

[8](Continued)

> The resulting impasse between EEOC and the employer has played a large part in the present failure or Title VII. The employer realizes that any attack on its policies by the EEOC presents largely an ineffectual threat. To comply with the Commission's interpretation of a problem, and to accord the appropriate relief, is a purely voluntary matter with the respondent with no direct legal sanctions available to EEOC. This absolute discretion available to respondents has not proven conducive to the success of Title VII objectives. In cases posing the most profound consequences, respondents have frequently ignored the EEOC's findings, preferring rather to chance the unlikelihood that the complainant will pursue his claim further through the costly and time-consuming process of court enforcement. The social consequences have been extreme.

could have predicted that the Courts would adopt a "systematic" view. It suggested that as soon as it became aware through reading court opinions that it would be judged not only on the equality of its actions and the purity of its motives but also on the possibility that it had unnecessary exclusionary employment systems it took steps to change those systems and eliminated any unjustified racial impact. The claim in terms of remedy focused on the perceived inappropriateness of penalizing it by requiring back pay for that period of time during which the systemic view of discrimination had not been clearly enunciated.

The Supreme Court politely declined to accept the Albemarle Paper Company's view of the law suggesting that one of the remedial purposes of the statute was to "make whole" individuals for economic damage they had suffered by discrimination. The Court pointed out that a remedy for discrimination was not punishment for moral turpitude but was, in fact, designed to achieve this make whole purpose.

In addition to a "make whole" objective of remedies the Supreme Court also suggested that the imposition of a tough back pay remedy whenever systemic discrimination was identified would provide employers with a substantial incentive to identify those discriminatory employment systems and change them voluntarily without waiting for government enforcement action. Specifically, the court suggested that the imposition of tough remedies would become a spur or catalyst which would cause "employers and unions to self-evaluate their employment practices and to endeavour to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.[9]

The third form of remedy which many Courts have utilized in the United States was not reached by the Supreme Court in the Moody case. Numerical remedies have been imposed in many cases. They involve, basically, an affirmative order of a court after a finding of discrimination that the remedy for the elimination of that discrimination should be framed with regard to the number of individuals hired as a function of race, sex or national origin. Often, a numerical remedy was imposed which required a one for three or a one-for-four hiring ratio of qualified members of the group previously discriminated against.

Stage #IV -- Voluntary Compliance

Now we come to the exciting part. What the Supreme Court hoped would happen in the Moody case is happening. Employers who for years talked voluntary compliance in order to dissuade us from

---

[9] Albemarle v. Moody, 422 U.S. 405, 418, 95 Supreme Ct. 236, 2372, 45 L. Ed. #2d 245 (1975).

enforcing the law are now doing voluntary compliance because they know we will. This fourth stage has to do with the litigation which occurs when meaningful voluntary compliance by employers becomes a reality. There are two elements to such litigation. When an employer takes voluntary action to remedy discriminatory employment systems he may be sued by the government which doesn't like the way he did it or which claims he hasn't gone far enough -- or by Whites and males who claim that he has gone too far. I want to call your attention to three recent court cases attempting to balance these issues and to the American Guidelines on Affirmative Action which attempt, for the first time, to protect an employer from being caught in the middle of a squeeze of this nature.

First, let's take a quick look at the process. We have told employers that an employment system with an adverse impact on minorities or women is illegal if it cannot be justified. We have imposed back pay for the victims of those systems and we have urged that they be changed voluntarily.

What happens when you voluntarily change a system which has operated to exclude Negroes to avoid the risk that you cannot justify it and will be required to pay back pay.

Well, first, the system which operates to exclude Blacks will operate to include Whites.

A system with an adverse impact on women has a positive impact on males. If you eliminate the adverse impact on Blacks you eliminate the positive impact for Whites. If you eliminate the adverse impact on women you also eliminate the positive impact on men.

Now what do you predict Whites and males will do about this situation.

Obviously, the individual Whites and males who no longer benefit from the old system which operated to exclude Blacks and females will be able to contain their enthusiasm for the immediate effect of the change upon them personally.

In fact, it was totally and completely predictable 15 years ago when we started down this trail of eliminating unnecessary exclusionary employment systems that, when we succeeded, the previous beneficiaries of those systems would be waiting at the end of the trail to challenge us, and they have now done so.

This is the meaning of the suit by Brian Weber and it is the meaning of the suit by Alan Bakke.

Frankly, I have heard some of my colleagues in the civil rights movements criticize and attack Brian Weber and Alan Bakke as being White racists. Respectfully, I would dissociate myself from that criticism.

In fact, I will go further: Brian Weber and Alan Bakke perceive themselves as aggrieved by legal developments. God help us in the United States if we ever have individuals who perceive themselves as similarly aggrieved if they do not feel free to go in and ask the court to help them.

It is totally and completely predictable that Brian Weber would file his lawsuit. I have no objections to him filing his lawsuit. I would have had a strong objection if he had won! In fact, one could make the argument that he did us a favor by filing his lawsuit for he provided the U.S. Supreme Court with an opportunity to clearly and unequivocably enunciate the principle that employers are entitled to voluntarily remedy their unnecessary exclusionary employment systems and to do so in a fashion which takes into consideration the race of the employees who are being hired, promoted, assigned or trained.

To understand this further let's take a quick look at the fact of the Weber case and at what the Supreme Court did.

The Kaiser Aluminum and Chemical Company operates a number of plants in the United States. Because the production of aluminum requires a large amount of water most of them are located on rivers.

In fact, there is one river which has three plants. Two of which have been involved in lawsuits prior to the Weber case and one of which was the subject of Brian Weber's litigation.

In the case of Parson v. Kaiser Aluminum and Chemical Company,[10] the system of assigning workers at one of Kaiser's plant to craft jobs was challenged on the ground that it discriminatorily violated Title VII. Specifically, it was demonstrated that a prior industrial experience requirement had an adverse impact on minorities and had not been validated and the case was remanded to the District Court to conduct a trial to determine whether the prior industrial experience requirement predicted probable job success and met the business necessity standard. It is understandable that the Kaiser Aluminum Company would be unhappy about this situation and would be concerned about the risk that they could not justify the requirement sufficiently to satisfy the court and that they would then be obligated to change the requirement and to pay back to individuals who had been excluded by its impact. It is equally predictable and understandable that they would attempt to avoid this situation in the fashion which the Moody case hoped they would.

It was completely predictable that Kaiser would not want to face the risk that some bureaucrat or court would find its justification inadequate; the further risk of back pay for those who had been injured by the system; and the extreme risk that a court or bureaucrat

---

[10] Parson v. Kaiser Aluminum and Chemical Co., 575 Fed. 2d 1374 17 FEP Cases 1272 (5th Cir. 1978).

would develop a new or alternative system which would be remedially imposed in order to eliminate the old system. Thus, it was predictable that Kaiser would attempt to develop its own alternative system which eliminated adverse impact. Before discussing the Weber case in which they did that, let me tell you about two earlier cases in which employers took action to avoid the kind of "attack" that hit Kaiser in the Parson case.

In Furnco v. Waters[11] an employer specifically took deliberate race conscious action in order to minimize the risk of a lawsuit by Blacks, and the Supreme Court described this action as if it were the most natural and logical thing in the world for an employer to do and, more importantly, the Supreme Court allowed the success of the action to end bureaucratic court governmental involvement.

Specifically, Furnco specialized in lining high temperature blast furnaces with "fire brick." Prior to the commencement of the particular contract which led to the lawsuit in question, Furnco's work force was approximately 5.7 per cent Black. This probably reflected, in part, the operation of a discriminatory recruitment system, for Furnco had traditionally utilized a word-of-mouth recruitment system pursuant to which the responsibility for recruiting and hiring was delegated to a job superintendent. Traditionally, this type of word-of-mouth recruitment system which had an adverse impact on Blacks had been found (in more than 40 court cases at the appellate level) to be illegal because an employer was unable to justify the business necessity for the practice.

In the Waters case Furnco followed the same system with one exception. The job superintendent at the job which led to the court case traditionally "did not accept applications at the job site, but instead hired only persons whom he knew to be experienced and competent in the type of work of persons who had been recommended to him as similarly skilled." The only change was that the company's general manager who appeared to be concerned with negotiations and a pending lawsuit directed the job foreman to recruit and hire on a race-conscious basis. Specifically, the Supreme Court found that the general manager had directed the foreman to "employ, as far as possible, at least 16 per cent Black bricklayers, a policy due to Furnco's self-imposed affirmative action plan to ensure that Black bricklayers were employed by Furnco ... in numbers substantially in excess of their percentage in the local union ...." (Quoting Justice Rheinquist in the majority, emphasis added.) When a Black bricklayer went to the plant gate and attempted to obtain a job he was informed, in essence, that the company was not hiring at the plant gate because it was using a word-of-mouth recruitment system. This unsuccessful employee and his attorney, being aware of the numerous appellate court decisions which had found a word-of-mouth recruitment system to be illegal because it had an adverse impact and could not be justified filed a lawsuit alleging discrimination. At the appellate court level the court found the

---

11 ____U.S.____, 17 F.E.P. Cases 1062 (June 29, 1978).

employer's defence of its system inadequate and (according to Rheinquist) "proceeded to devise what it thought would be an appropriate hiring procedure for Furnco ...." The Court of Appeals spelled out an alternate system which appeared in its mind to meet the legitimate business needs of Furnco and which, as described by the Supreme Court, involved the taking of "written applications, with inquiry as to qualifications and experience, and then check, evaluate and compare those claims against the qualifications and experience of other bricklayers with whom the superintendent was already acquainted."

Lawyers can disagree about what the case means but it is very clear that the Supreme Court found that the appellate courts should not substitute their perception of what constitutes the "best" hiring procedures for the procedure actually adopted by the employer. The Supreme Court recognized the appropriateness of imposing alternate employment systems where Title VII has been violated but it made it clear that the court "may not impose such a remedy on an employer at least until a violation of Title VII has been proved...," and it found that no violation existed. Whatever the technical language of the opinion the result is clear. The attempt of a court (and I assume of a bureaucrat) to substitute its preferred alternative selection system for those adopted by an employer will be rejected in situations where the employer has made his selection systems work voluntarily to eliminate adverse impact which is, after all, the triggering mechanism of a Griggs type case.

The court took similar action in a case entitled County of Los Angeles v. Davis, where tests utilized by the employer had an adverse impact and were challenged by litigants who wanted them to be validated or eliminated. In the course of the lawsuit, the employer eliminated the adverse impact of its procedure by taking for interview the 500 applicants who passed their written examination including the "highest scoring 300 Whites, 100 Blacks, [and the] 100 Mexican-Americans." The result of this process was a hiring rate that was at least 50 per cent minority and the elimination of adverse impact. The Supreme Court refused the attempt of those challenging the practices to require their validation and/or elimination and mooted the case on the ground that the triggering mechanism of adverse impact had been successfully eliminated on a voluntary basis and that there was no case for the court to consider.

These two cases in which the attempt of courts and bureaucrats to impose their own idea of an appropriate alternative system which eliminates adverse impact upon Furnco and the County of Los Angeles led inevitably to the next case which was Weber v. Kaiser Aluminum and Chemical Company, to which I now return.[12]

---

[12] ____U.S.____, (1979). For majority opinion. See editors' note at end of paper.

When employers start to do the kinds of things that were done in Furnco and the Los Angeles case it is inevitable that a White or male will be considered and will file a complaint alleging that this action goes too far. Under the American system of jurisprudence this is healthy and it would be most unfortunate if someone perceived themselves aggrieved in this fashion and failed to file a complaint. However, in the lankmark case of United Steel Workers of America, AFL-CIO v. Weber, the Supreme Court made it clear that employers can go a long way without going "too far."

Specifically, in 1974, the Steelworkers Union and Kaiser Aluminum had entered into a contract for employment at 15 of Kaiser's plants which included an affirmative action plan. The plan was designed to eliminate conspicuous racial imbalance in Kaiser's then almost exclusively White craft work force (which created a prima facie case in the Parson case previously discussed) by reserving for Black employees 50 per cent of the openings in in-plant craft-training programs until the percentage of Black craft workers in plant was commensurate with the percentage of Blacks available in the labor force.

Weber filed a suit when he, a White man, was denied a position in one of these training programs. The Supreme Court specifically held:

> That Title VII does not prohibit such race-conscious affirmative action plans.

The only way to read the majority opinion in Weber is to say that it constitutes a declaration of independence for the right of an employer to come into compliance voluntarily by methods of his or her own choosing rather than in accord with the alternate systems developed under the whim of some Federal enforcement bureaucrat or some court. The Supreme Court recognized that employers may need to take race-conscious action to eliminate employment systems that have had an exclusionary impact on minorities and women and the clear purpose of Title VII (as EEOC pointed out in the Preamble to the Affirmative Action Guidelines) requires that employers be able to do this with a maximum of flexibility. For example, the court examined an argument that section 703(j) was designed to prevent such action, and it suggested that Congress did not "intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action." The Supreme Court went on to say that a prohibition of "all voluntary, race-conscious affirmative action" would not serve the goals of those members of Congress who participated in framing Title VII in such a fashion as to minimize "Federal government interference with private business because of some Federal employee's ideas." The court specifically found that Congress did not intend to "augment the powers of the Federal government and diminish traditional management prerogatives."

In Weber the Supreme Court said that it would not

> ...today define in detail the line of demarcation between permissible and impermissible affirmative action plans.

However, the Court said that the Kaiser-USWA affirmative action plans was on the permissible side of the line and it proceeded to describe its perception of the Weber plan and to suggest at least four standards which are useful in thinking about such plans:

-- Purpose: The Court pointed out that the purposes of the plan "mirror those of the statute" in that both the plan and Title VII were designed to

> "...open employment opportunities for Negroes in occupations which have been traditionally closed to them." (Quoting Senator Humphrey from the legislative discussion of Title VII in 1964.)

-- Interest of Whites Untrammelled: The Court states that the Kaiser plan did not "unnecessarily trammel the interests of the White workers." It specifically pointed out that the plan did not "require the discharge of White workers and their replacement with new Black hires," and it cited to its own earlier opinion in McDonald v. Santa Fe Trail Transportation.

-- No absolute Bar to Whites: The Court pointed out that half of those trained in the program will be White and that the plan does not "create an absolute bar to the advancement of White employees."

-- Plan is Temporary: The Court points out that the Kaiser plan is "temporary." It indicates that it is not designed to maintain permanent racial balance in the employer's work force but only to "eliminate a manifest [present] racial imbalance." It specifically points out that the preferential selection of trainees would end "as soon as the percentage of Black skilled craft workers in the ... plan approximate the percentage of Blacks in the local labor force."

These four attributes of the Kaiser plan suggest the kinds of questions which Courts will be asking of these plans in the future: What was their purpose? Did they unneccesarily trammel Whites? Was there absolute bar? Is the plan temporary? Those who would begin to flesh out more details as to how these questions get answered are referred first to the Kaiser plan itself and secondly to the ideas on the preparation of such plans contained in the EEOC Guidelines on Affirmative Action and the "Policy Statement on Affirmative Action programs for State and Local Government" which is incorporated and quoted at length in both the Affirmative Action Guidelines (1608.4(c)(1)) and in the Uniform Guidelines on Employee Selection Procedures (Section 17).

Conclusion

Thus, the four stages I mentioned. We established the procedural powers of our agency, we established that a violation of our law to be framed in terms of unnecessary exclusionary employment systems, established as a remedy tough back pay and governmentally imposed alternative systems, and finally our courts have made it clear that employers are encouraged to change their systems voluntarily.

The Furnco and Davis cases make it clear that if employers do change their system voluntarily they will be allowed substantial flexibility and leeway in determining the nature of the alternative system and if the alternative system eliminates adverse impact the triggering mechanism for a Griggs type case having been eliminated the courts won't probe the details of how they did it. This is reinforced by the EEOC Selection Guidelines[13] which in Section 6 encourages employers to voluntarily eliminate adverse impact without having to validate their procedures. Finally, the Weber case and the EEOC Guidelines on Affirmative Action[14] make it clear that if an employer takes race conscious action in attempting to change its systems and is challenged by a White or male on the grounds that it has gone too far there will be protection.

Now what is the relevance for all of this for Canada. I have several thoughts:

1. It is presumptuous for me to make recommendations to citizens of another country particularly given the many failures which we have had in the United States in attempting to deal with this problem in a responsible fashion. However, you are approaching this problem from an industrial relations point of view and that has encouraged me to be bold.

2. I recommend that you continue to approach it as an industrial relations problem.

3. I recommend that you give serious consideration to the vigorous enforcement of antidiscrimination legislation. My experience in the United States indicates that voluntary compliance is meaningless until there is a law enforcement

---

[13] See: 43 Federal Register, 38290 (Aug. 25, 1978). See also: "Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of The Uniform Guidelines on Employee Selection Procedures." 44 Federal Register 11996 (March 2, 1979) See Editors' note at end of paper.

[14] See: 44 Federal Register, 4422 (January 19, 1979). See Editors' note at end of paper.

framework. When I worked for the Missouri Commission in the 1960s and in my early days at EEOC, employers were always pleading with us "you don't need to enforce the law just tell us what you want us to do" but they then did nothing. Now the law has been enforced. EEOC through its program[15] of initiating complaints of systemic discrimination where there are statistical disparities indicating the possibility of an unnecessary exclusionary employment system and the Supreme Court's implementation of a tough back pay award in Moody have now given employers the incentive to comply voluntarily. But tough enforcement came first.

4. I recommend you give serious consideration to adopting a systems approach to defining discrimination and that you define discrimination in terms of unnecessary exclusionary employment systems -- that is, systems which have an adverse impact on minorities and/or women, which cannot be shown to predict probable job success, and for which there are available alternate suitable systems without an undesirable exclusionary impact.

5. I recommend that enforcement efforts be directed at getting employers to change those systems and that voluntary compliance efforts be directed toward getting them to change them voluntarily.

6. In terms of the Weber problem you are, frankly, way ahead of us in Canada. Section 15 of your statute provides that an employer may undertake an affirmative action program of a race conscious nature within parameters approved by the government. The Canadian Human Rights Commission under the excellent leadership of Chairman Gordon Fairweather has begun to take a responsible systemic approach[16] to dealing with discrimination and to assisting employers in taking significant affirmative

---

[15]See: "Standards for Selection of Subjects for Systemic Discrimination Procedures: June 20, 1978. See Editors' note at end of paper.

[16]See, for example, his remarks to Bell Canada Personnel Managers on September 11, 1978 where he talked of his perception of what constitutes discrimination:

> "...The purity of your motives is not what matters. What really matters is the impact (emphasis in the original) of your employment systems and personnel practices. Do they have the effect of excluding certain groups from employment opportunities or not?"

He went on to raise the question of the "business necessity" of practices with such an impact and to encourage "a fresh look at your programs and your policies."

action to change their systems. The Affirmative Action Division of the Canadian Employment and Immigration Commission under the excellent leadership of Elizabeth McAllister has already trained individuals in each of the regional offices of the department to begin couselling with employers on how they can voluntarily remedy their exclusionary employment systems within the framework of the statute and particularly Section 15 and with emphasis on utilizing the resources of the department to provide minorities and women with access to the job opportunities which will be created when employers voluntarily change their systems. Frankly, when I look at the language of your law and the broad scope of its coverage; when I look at the calibre of the individuals who are administering your programs; and when I look at the work which they have begun I am most optimistic. Frankly, you are many years ahead of where we were in the United States at a similar stage in our own evolution and I predict for your success. I hope these brief remarks have been useful to those of you who are working on the program, and I wish you the best of luck. Please feel free to call upon me if I may ever be of assistance to you in your endeavors.

Editors' Note:

Copies of the following documents, which were originally Appendices to Mr. Robertson's speech, may be obtained by writing to: Women's Bureau, Labour Canada, Ottawa, Ontario, K1A 0J2.

Appendix 1: Affirmative Action Guidelines - Technical Amendments to the Procedural Regulations, Equal Employment Opportunity Commission, Washington, D.C., Federal Register, Vol. 44, No. 14, January 19, 1979.

Appendix 2: Revised Standards for Selection of Subjects for Systemic Discrimination Proceedings, Equal Employment Opportunity Commission, Washington, D.C., June 20, 1978.

Appendix 3: Adoption by Four Agencies of Uniform Guidelines on Employee Selection Procedures (1978), Equal Employment Opportunity Commission, Washington, D.C., Federal Register, Vol. 43, No. 166, August 25, 1978.

Appendix 3A: Adoption of Questions and Answers to clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures. Equal Employment Opportunity Commission, Washington, D.C., Federal Register, Vol. 44, No. 3, March 2, 1979.

Appendix 4: (Syllabus) United Steelworkers of America, AFL-CIO-CLC v. Weber et al, Certiorari to the U.S. Court of the Fifth Circuit, No. 78-432, Supreme Court of the United States, Argued March 28, 1979 - Decided June 27, 1979.

WORKSHOP ON EQUAL PAY

Resource Persons:

G.M. Harper (Chair)
Procter and Gamble Company

Claude Bernier
Canadian Human Rights Commission

Morag McNeil (Recording Secretary)
McMaster University

EQUAL PAY FOR WORK OF EQUAL VALUE

By
Claude Bernier

Background

People are now much more aware of the importance of equal opportunity in the workplace than they were in the past. This is not to imply that employers and employees' representatives should feel guilty about their past methods of human resources management, since they tended to reflect the value system of the society of which they were a part. Nevertheless, it must be said that the practices, values and methods of the past have created a situation where inequalities are firmly entrenched in a wide variety of employment systems.

If we had been aware of the system that we were creating over the years, when our pay scales, job descriptions, collective bargaining arrangements, pension plans, recruitment practices, and so on, were evolving, perhaps things would have been done differently. But no one really challenged the basic assumptions, and so we are now faced with a complex labour market with very unequal rewards and opportunities across the system.

The principle of equal pay for work of equal value is, of course, the outcome of many years of attempts to achieve wage parity for women--and in particular, for classes of jobs predominantly staffed by women. Women started off at a fairly low level, which is understandable, when they began to enter the work force in greater numbers in the 19th century. The problem is that so many of them--almost all of them, in real terms--have stayed there up to the present day.

It's not as if nobody noticed. A woman writer who, like George Eliot and George Sand, took the name of George as her pen name--George Paton--was commenting on the phenomenon in 1894:

> of late years employers have made the startling discovery that women of birth and education may be adapted for other uses than those of household ornament and domestic pet; that they may be converted, in fact, to sober, industrious and very useful drudges, who will work carefully, quickly and thankfully for half the salary that would be required for a man of equal qualifications.... Poor ladies, charmed at the prospect of independence and release from the necessity of becoming governesses without a gift for teaching, or companions without the requisite cheerfulness or domesticity, or wives without love or respect, flock to the city and pick up the crumbs that fall from the businessmen's tables.

So it all started. She also claimed that women worked harder than men, which was why men tried to keep them out of the professions. I am not going to get into that discussion right now, however!

The concept of equal pay for equal work had been introduced in Canadian legislation in the 1960s, but its restrictive interpretation which required that two jobs be similar, to be comparable, increased the systematic categorization of jobs and the making of ghettos of female (i.e., nurse, secretary) and male (i.e., technician, driver) jobs. Even in situations where men are performing substantially the same duties as women, it has been possible to pay the men and women at different rates by giving them different job titles, making different physical requirements for the jobs (whether they are relevant to the performance of it or not), inserting a few putative extra duties into the men's job description, and so on. The courts have generally had to find, given the way the laws have been worded, that women had to be performing exactly the same duties as men to get the same pay, and you know that a large number of women perform work that is not exactly the same as work performed by men. It does them no good to be entitled to the same wages as a man would get for doing the job if no men are doing it.

The discrepancy between the salaries of men and women and the sexist categorization of jobs has increased in such a way that in 1978 Canadian statistics indicated that:

- close to 50 per cent of working women are breadwinners, the proportion of people earning less than $6 000 a year divides this way:

  28% men breadwinners
  61% women breadwinners

- and families living under the poverty level divide this way:

  8.5% men breadwinners
  44.1% women breadwinners

Some 1977 statistics show that the percentage distribution of the labour force is as follows:

Male:	10% agriculture	35% industry	55% services
Female:	4% agriculture	15% industry	81% services

Most of the women working in industry are in the food, textile and clothing industries, where the weekly average salary was under the national average salary of $270 a week in 1978.

Finally, some 1971 statistics indicate that 46.4 per cent of the women workers were concentrated in 10 occupations, which were: 1) Stenographers and typists; 2) sales clerks; 3) baby sitters, maids and related service workers; 4) school teachers; 5) tailoresses, furriers and related workers; 6) waitresses and bartenders; 7) graduate nurses; 8) nursing assistants and aides; 9) telephone operators; and 10) janitors and cleaners. Seventy-two per cent of all workers in these 10 categories were female.

In 1971, in Canada, the wage gap between men and women was 59 per cent and since then it increases every year, the earnings becoming approximately equal only where men and women work on exactly the same jobs within the same firm.

These statistics stress the necessity of questioning and modifying the systems which standardize such a categorization of jobs. There are two ways, distinct and complementary, to address the issue: the concept of equal opportunity which refers to the hiring systems, training programs and so on, and the concept of equal value, which refers to the compensation and classification systems.

Section 11

Section 11 of the Canadian Human Rights Act, which refers to the concept of equal value, tends to eliminate the job ghettos and stresses the necessity of questioning the compensation and classification systems.

The significant change that comes with equal pay for work of equal value is that the nature of the work is not the issue. Dissimilar jobs can be compared, and must be paid at an equal rate, if they are of equal value. Value is to be measured on the basis of the skills, effort and responsibility involved in the work, and the conditions under which it is performed. The value is the composite of these four criteria, so that a job which involved a special skill but very little responsibility could be evaluated at the same level as a job which involved a lot of effort, some responsibility, but not much skill.

Principles

The Canadian Human Rights Commission is responsible for the implementation of the Act which applies to all organizations under federal jurisdiction. Right at the beginning the Commission established basic principles to be followed in the implementation of the concept.

First, the Commission considers that the outside market is discriminating against certain categories of jobs and that the principle of demand and supply has been distorted, the historic value of jobs having been established based on an imbalance of factors and characteristics. That is why the value of the jobs will have to be established in relation to the value of other jobs within the establishment and not only in relation to the outside market.

Second, having done studies in different establishments across the country and as a result of extensive studies on job evaluation systems done in the United States, Europe and Canada, we found that those systems are characterized by their adaptability to organizations, categories of jobs as well as people developing and using them. That is why instead of developing its own system and imposing

it on employers, the Commission has decided to use systems in use in the establishments and develop parameters, based on the four criteria, "skills, effort, responsibility and working conditions," to check those systems and the way they are used.

Third, Section 11 aims at establishing more fairness in pay between men and women, rather than challenging the overall Canadian economic structure by standardizing wages across the country. That is why, in defining the establishment, it took into account the regional economic disparities which are generally accepted.

Finally, because of the fact that job evaluation systems depend on the perception of individuals using them, the Commission considers it extremely important to seek to modify the attitude, behaviour and plans of employers, unions and individuals involved in compensation and classification in order to eliminate the tendency to classify jobs by sex. Education programs and information on the subject are available at the Commission and will be offered to employers and unions before the end of 1979.

How the Act is Applied

Since 1951, when the International Labour Organization recognized the principle of equal pay for work of equal value in an international convention, some countries like the United Kingdom, Belgium, France, Italy, and New Zealand, have amended their legislation to include the concept of equal value. But almost all of them cannot really implement it because of the lack of power and flexibility of their legislation.

1. The Canadian legislation, for itself, establishes an independent Commission, reporting directly to Parliament. This gives the Canadian Human Rights Commission more freedom to apply the law.

2. The Commission can also, at any time, issue guidelines, setting forth the extent to which and the manner in which any provision of the Act applies. These guidelines, which can be revoked or modified at any time by the Commission, are binding on the Commission and any Human Rights Tribunal.

3. Section 39 of the Canadian Act stipulates that the Commission may, at any stages after the filing of a complaint, appoint a Human Rights Tribunal. The Tribunal may consist of up to three members, has the same power as a Superior Court of record and may make an order against a person or an organization found to be engaging or to have engaged in a discriminatory practice, to cease such practice, and to adopt special programs or give new opportunities or privileges to the victim, or compensate the victim for wages, expenses or additional costs by the victim. Intimidation or discrimination against a complainant is clearly forbidden in section 45 of the Act and an organization who is guilty of an offence is liable to a fine which can be up to $50 000.

4. Sections 32 and 33 of the Act describe how the Commission deals with complaints and gives much flexibility, letting the Commission decide on the best way for a complaint to be handled. The Commission can also initiate complaints itself, where it has reasonable grounds to believe that a discriminatory practice is taking place.

Economic and Social Repercussions

You can easily imagine that the implementation of the equal value concept, as it is written in section 11 of the Canadian Human Rights Act, with as much freedom, flexibility and power to apply it, will provoke important social and economic changes. Studies done in the United States and Canada have shown that an average of 20 per cent of salary discrimination was related to the sexual categorization of jobs and workers. The elimination of ghettos will certainly have a financial impact within the establishment and on the outside market. We don't know how much it will cost because there are so many elements that cannot be known. What is fairness worth? What is justice worth? How many women have been subsidizing the economy in their pay cheques? For how many years? What will be the effect on women's productivity of an acknowledgment of their true contribution and its value?

There are some other effects that we also have to consider. The fact that employers and unions will have to assess the value of jobs before establishing the wages will modify, in certain organizations, the negotiation process between the parties.

The fact that we will compare different jobs will bring us to compare salary scales negotiated by different unions within an organization, showing the power or the lack of power of those unions. Section 9 of the Act indicates that an employee organization cannot discriminate against its members. Although the idea of equal pay for work of equal value is simple and straightforward, the cases themselves are extremely complex. The Commission considers it important that both employers and unions be involved in the implementation of the concept, so that they will be prepared to deal with the consequences of such an implementation.

Of course, there is resistence. We would be naive to think that such extensive changes to such a well-entrenched system can come about easily. Of course it will be gradual. We expect to have a hard fight on each and every one of the early cases and that will mean that each case takes a long time. But we feel that we have a better instrument here for equalizing women's role in the workplace than has ever been developed before, and we are optimistic.

EQUAL PAY LEGISLATION - FEDERAL AND ONTARIO
By
G.M. Harper

1. Status of current legislation.

   (a) Federal -- (Attachment 1)

   (b) Ontario -- (Attachment 2)

2. Bill 3 (Ontario) -- (Attachment 3)

   This Bill is a Private Members' Bill introduced by Mr. Bounsall (NDP). It received second reading on May 17, 1979 and was referred to the General Government Committee for clause by clause consideration.

3. Various criteria by which jobs/pay may be compared. (Attachment 4)

4. Allowable differences. (Attachment 5)

5. Conclusions. (Attachment 6)

CANADIAN HUMAN RIGHTS ACT

S.C. 1976-77, c 33, assented to July 14, 1977, ss 21-30 and s.57 proclaimed in force August 10, 1977 by proclamation gazetted September 10, 1977, the remainder proclaimed effective March 1, 1978 by proclamation gazetted March 18, 1978; as amended 1977-78, c. 22, s. 5, effective April 12, 1978.

An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enact as follows:

Short title (5101)

Sec. 1.--This Act may be cited as the Canadian Human Rights Act.

Purpose of Act (5102)

Sec. 2.--The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:

(a) every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap; and

(b) the privacy of individuals and their right of access to records containing personal information concerning them for any purpose including the purpose of ensuring accuracy and completeness should be protected to the greatest extent consistent with the public interest.

Sec. 11. Equal Wages.--(1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.

(2) Assessment of value of work.--In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.

(2.1) Separate establishments.--Separate establishments established or maintained by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees shall be deemed for the purposes of this section to be a single establishment.

(3) Different wages based on prescribed reasonable factors.--Notwithstanding Subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines issued by the Canadian Human Rights Commission pursuant to Subsection 22(2) to be a reasonable factor that justifies the difference.

(4) (Sex not a reasonable factor).--For greater certainty, sex does not constitute a reasonable factor justifying a difference in wages.

(5) No reduction of wages.--An employer shall not reduce wages in order to eliminate a discriminatory practice described in this section.

(6) "Wages" defined.--For the purposes of this section, "wages" means any form of remuneration payable for work performed by an individual and includes salaries, commissions, vacation pay, dismissal wages, bonuses, reasonable value for board, rent, housing, lodging, payments in kind, employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans and any other advantage received directly or indirectly from the individual's employer.

Sec. 22(2) Guidelines.--The Commission may, at any time on application or on its own initiative, by order, issue a guideline setting forth the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a particular case or in a class of cases described in the guidelines and any such guideline is, until it is subsequently revoked or modified, binding on the Commission, and Human Rights Tribunal appointed pursuant to Subsection 39(1) and any Review Tribunal constituted pursuant to Subsection 42.1(2) with respect to the resolution of any complaint under Part III regarding a case falling within the description contained in the guideline. (1977-78, c.22, s. 5(1).

ONTARIO EMPLOYMENT STANDARDS ACT, 1974

Part IX - Equal Pay for Equal Work (61,053)

Sec. 33. (1) No employer or person acting on behalf of an employer shall differentiate between his male and female employees by paying a female employee at a rate of pay less than the rate of pay paid to a male employee, or vice versa, for substantially the same kind of work performed in the same establishment, the performance of which requires substantially the same skill, effort and responsibility and which is performed under similar working conditions, except where such payment is made pursuant to

(a) a seniority system,

(b) a merit system,

(c) a system that measures earnings by quantity or quality of production, or

(d) a differential based on any factor other than sex.

Pay not to be reduced

(2) No employer shall reduce the rate of pay of an employee in order to comply with Subsection 1.

Employer not to be requested to contravene Subs. 1

(3) No organization of employers or employees or its agents shall cause or attempt to cause an employer to agree to or to pay to his employees rates of pay that are in contravention of Subsection 1.

Determination by employment standards officer

(4) Where an employment standards officer finds that an employer has failed to comply with Subsection 1, the employment standards officer may determine the amount of moneys owing to an employee because of such non-compliance, and such amount shall be deemed to be unpaid wages.

BILL 3 - ONTARIO

Equal Pay for Work of Equal Value

1. Sec. 33. (1) No employer or person acting on behalf of an employer shall establish or maintain any difference in wages paid to a male and to a female employee employed in the same establishment who are performing work of equal value unless the difference is based on seniority or quantity of production.

(2) An employment standards officer may assess the value of work performed for the purposes of Subsection 1 and where the officer finds that an employer has failed to comply with Subsection 1, the officer may determine the amount of moneys owing to an employee because of such non-compliance, and such amount shall be deemed to be unpaid wages.

(3) In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.

(4) No employer shall reduce the rate of pay of an employee in order to comply with Subsection 1.

(5) No organization of employers or employees or its agents shall cause or attempt to cause an employer to agree to or to pay to his employees wages that are in contravention of Subsection 1.

2. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

CRITERIA FOR JOB COMPARISONS

Simplest -- Equal Pay for Identical Jobs

Broader (current Ontario legislation)

The law establishes five criteria which must be examined before it can be said that the employer is in violation of a statutory obligation to give equal pay for equal work. The work (i) must be substantially the same kind in the same establishment; require (ii) substantially the same skill, (iii) substantially the same effort, (iv) substantially the same responsibility; and (v) be performed under similar working conditions.

The jurisprudence in this area has held that all five of these conditions must exist before the standard can have application. In assessing whether or not the legislation has been violated, it is necessary for the adjudicator to consider each criterion separately and if it is found that one of the conditions is not met, then the legislation cannot be applied. For example, if two jobs require substantially the same skill, effort and responsibility and involve similar working conditions, but are totally dissimilar in nature, the employment standard would not be applicable. Similarly, if two jobs are similar in nature, involve equal skill and responsibility and are performed under similar working conditions, but the lower paid job does not qualify as equal in effort, the equal pay legislation cannot be applied.

The key elements in the legislation are that there must be some broad identity between the two jobs under consideration and the five criteria listed above must be individually compared for each job. If there is a difference in any one of the criterion, then the legislation does not apply.

Broader Still (current Federal legislation)

The Canadian Human Rights Commission issued the following Equal Wage Guidelines, effective September 27, 1978.

Sec. 3. Subsections 11(1) and (2) of the Act apply in any case in such a manner that in assessing the value of work performed by employees employed in the same establishment to determine if they are performing work of equal value.

(a) the skill required in the performance of the work of an employee shall be considered to include any type of intellectual or physical skill required in the performance of that work that has been acquired by the employee through experience, training, education or natural ability, and the nature and extent of such

skills of employees employed in the same establishment shall be compared without taking into consideration the means by which such skills were acquired by the employees;

(b) the effort required in the performance of the work of an employee shall be considered to include any intellectual or physical effort normally required in the performance of that work, and in comparing such efforts exerted by employees employed in the same establishment.

(i) such efforts may be found to be of equal value whether such efforts were exerted by the same or different means, and

(ii) the assessment of the effort required in the performance of the work of an employee shall not normally be affected by the occasional or sporadic performance by that employee of a task that requires additional effort;

(c) the responsibility required in the performance of the work of an employee shall be assessed by determining the extent to which the employer relies on the employee to perform the work having regard to the importance of the duties of the employee and the accountability of the employee to the employer for machines, finances and any other resources and for the work of other employees; and

(d) the conditions under which the work of an employee is performed shall be considered to include noise, heat, cold, isolation, physical danger, conditions hazardous to health, mental stress and any other conditions produced by the physical or psychological work environment, but shall not be considered to include a requirement to work overtime or on shifts where a premium is paid to the employee for such overtime or shift work.

Ontario - Bill 3 (proposed)

Sec. 33.(3) In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.

Bill 3 is a radical departure from the existing Ontario legislation. It requires that work which may have no connection or similarly whatsoever be compared to determine whether it is of equal value. The Bill also requires that a composite of the factors of skill, effort, responsibility and working conditions be compared rather than a comparison of each individual factor.

The fundamental requirement which is now contained in section 33(1) of Bill 3 is to require "equal pay for work of equal value." Thus, where the criteria specified in section 33(3) have been met, the employer will be found to have committed a discriminatory practice by establishing different wages between male and female employees if they are performing work of equal value "regardless of the fact that the jobs themselves are totally dissimilar."

The problem with the concept of "equal value" is the difficulty in measuring the value of entirely different jobs. Any comparison involves various subjective elements which are not capable of being adequately determined by measurable standards. The legislation states that the criteria to be applied in assessing the job value are "the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed." This, of course, may be a very difficult task to perform where the jobs are totally different and involve different types of skill, effort and responsibility. The effect of this Bill, however, will be to require employers to ascribe values to the different criteria and make the required comparisons between jobs based on the composite value placed upon the criteria.

In the face of this type of legislation, the most widely used and best known process which has been developed for producing a standard of measurement of the content of jobs is a job evaluation system. An allegation that an employer is in violation of "equal pay for work of equal value" legislation may be resisted by introducing the results of a bona fide job evaluation scheme. However, once an employer adopts a job evaluation system, it may well become bound by the results whether it agrees with them or not. If it fails to translate the results into wage rates, it runs the substantial risk of being considered in contravention of the legislation since if the evaluation process equates two jobs, it is evidence that the employees performing the work should be paid equally.

Allowable Differences

1. Ontario (current)

Having identified the 5 criteria in the previous exhibit which must be met in order to justify equal pay, the Act also provides for a series of exceptions which permit pay differentials between males and females where the difference is based on:

(a) seniority;

(b) merit;

(c) quantity or quality of production; or

(d) any factor other than sex.

2. Federal (current)

3. Different wages based on prescribed reasonable factors - Notwithstanding Subsection (1), it is not discriminatory practice to pay to male and female employees different wages if the difference is based on a factor precribed by guidelines issued by the Canadian Human Rights Commission pursuant to Subsection 22(2) to be a reasonable factor that justifies the difference.

Section 4. (1) Subject to Subsection (2), for the purpose of Subsection 11(3) of the Act, the factors prescribed to be reasonable factors justifying differences in the wages paid to male and female employees employed in the same establishment who are performing work of equal value are the following, namely,

(a) different performance ratings, where these are given to the employees by means of a formal system of performance appraisal that has been brought to the attention of the employees;

(b) seniority, where a wage and salary administration scheme applies to the employees and provides that they receive periodic pay increases based on their length of service with the employer;

(c) red circling, where the position of an employee is re-evaluated and as a result is down-graded, and the wages of that employee are temporarily fixed, or the increases in the wages of that employee are curtailed, until the wages appropriate to the down-graded position are equivalent to or better than the wages of that employee;

(d) a rehabilitation assignment where an employer pays to an employee wages that are higher than justified by the value of the work performed by that employee while that employee recuperates from an injury or illness of limited duration;

(e) a demotion pay procedure, where the employer reassigns an employee to a position at a lower level because of

(i) the unsatisfactory work performance of the employee caused by

(A) the deterioration in the ability of the employee to perform the work,

(B) the increasing complexity of the job, or

(C) the impaired health or partial disability of the employee or other cause beyond the control of the employee, or

(ii) an internal labour force surplus that necessitates the re-assignment of the employee to a position at a lower level,

and the employer continues to pay to the employee the same wages that he would have paid if he had not re-assigned the employee to a position at a lower level;

(f) a procedure of phased-in wage reductions, where the wages of an employee are gradually reduced for any of the reasons set out in subparagraph (e)(i); and

(g) a temporary training position, where for the purpose of an employee development program that is equally available to male and female employees and leads to the career advancement of the employees who take part in that program, an employee is temporarily assigned to a position but receives wages at a different level than an employee who works in such a position on a permanent basis.

(2) The factors set out in Subsection (1) are prescribed to be reasonable factors justifying differences in wages if they are applied consistently and equitably in calculating and paying the wages of all male and female employees employed in the same establishment who are performing work of equal value.

Ontario (proposed)

33.--(1) No employer or person acting on behalf of an employer shall establish or maintain any difference in wages paid to a male and to a female employee employed in the same establishment who are performing work of equal value unless the difference is based on seniority or quantity of production.

We have seen that the exceptions to the concept of equal pay in the present Ontario legislation include seniority, merit, quantity or quality of production and a differentiation based on a factor other than sex. The current Federal legislation recognizes differences in pay on the basis of performance ratings, seniority, red circling, rehabilitative work, demotion pay procedures, temporary training positions, etc. Bill 3 recognizes only two differences which justify a pay differential; seniority and quantity of work. Merit and quality of work will apparently no longer be acceptable reasons for pay differences between male and female employees.

This may restrict an employer wishing to reward an employee for the quality of his work or on the basis of a merit system. This deficiency could be a serious short-coming in the proposed legislation.

Conclusions

It is common in larger industries to use job evaluation as the instrument to rank, on as equitable a basis as may be achieved with reasonably objective criteria, jobs within the same general types of work.

For example, a "production worker" job evaluation system would be used to evaluate the production jobs performed by men and women and to rank them, without regard to the sex of the performer, in relation to the various quantitative factors for that type of work in that operation.

Similarly an "office operation" job evaluation system would be used to rank office jobs, clerical, filing, accounting, secretarial, inventory, production scheduling, sometimes technical jobs -- again regardless of the sex of the performer -- but using the quantitative factors appropriate for that general type of work.

The concept of the proposed Ontario legislation would probably result in the need to create an overall formula for job evaluation which would be capable of ranking production and clerical jobs within each organization. A staggering task when one considers the extreme of skills, efforts, responsibilities, and working conditions encountered in jobs in such diverse operations as mining, construction, manufacturing, general office, and professional organizations.

The present system originates from many separate sources, but it has checks and balances at several points to keep on track. The supply and demand process -- the foundation of free enterprise, which in the long run, assures reasonable conformity to the values placed by a larger group on the worth of the services of a particular skill to a particular operation. These values may change over time.

The process by which organizations establish their average wage rates -- comparisons with the community, the collective bargaining process -- are also part of the system of checks.

The challenge facing the concept of equal pay for equal work as proposed in Bill 3 is the challenge of trying to create, in my opinion, an unmanageable device.

It is difficult to argue against the concept of equal pay for equal work, but who, in the long run, will be able to satisfactorily devise a system that will equitably rank all jobs in all organizations and will satisfy the laws of supply and demand and the particular needs of particular organizations to establish their own "pecking" order of jobs.

Rather, the concept of equal opportunity would perhaps more easily achieve the same end result. To that end serious consideration had best be given by all organizations to whether or not, in reality, women have the opportunities to progress through organizations. This will require a scrutiny of such things as prerequisite experience/skills for jobs, promotional paths, etc., to be sure that the criteria are truly job related.

WORKSHOP ON AFFIRMATIVE ACTION

Resource Persons:

Dr. B. Ubale (Chair)
Ontario Human Rights Commission

Debbie Field
Ontario Public Service Employees Union

A.E. Richards
Bell Canada

Frank Zinszer (Recording Secretary)
Hamilton Brick Company

AFFIRMATIVE ACTION: OBJECTIVE AND POLICY

By
Dr. B. Ubale

Introduction:

Affirmative Action means many things to many people. The phrase was first coined in March 1961, when John F. Kennedy issued an executive order requiring that contractors act affirmatively to recruit minorities on a nondiscriminatory basis. It was a policy geared toward ensuring qualified minorities equal access to job opportunities. Affirmative action originally meant that employers should aggressively seek out qualified applicants from sources where they might be found. Since that time it has been enlarged to include compensatory training, preferential treatment, goals, quotas and busing.

Contemporary social ills and their remedies are viewed not in terms of problems themselves but in terms of their presumed consequences for certain racial groups, and it is assumed that one racial group benefits at the expense of others. The supposed polarity of Whites and non-Whites over economic policy is based on the assumption that if you are White you are gainfully employed and if you are non-White you are not likely to be.

The non-Whites feel that affirmative action is justified compensation for past discrimination and necessary to assure and hasten their progress. In order to change historical imbalance which has favoured Whites, it is important that positive action, i.e., affirmative action be taken in favour of non-Whites.

Objectives:

The objective of affirmative action therefore is to facilitate the entry into the work force of qualified members of minorities that have been traditionally excluded.

A fundamental idea of the discrimination theory is that individual efforts are thwarted by racism perpetuated by institutionalized biases in admission, hiring and promotion practices. Even though many formal and legal barriers to achievement have been struck down, it is not enough to state that from now on everybody will compete on the basis of his/her individual merits.

The gaps in social, economic and educational advantage between non-Whites and Whites are still so wide that there is no racially neutral process of choice that will produce more than a handful of minority people. Any method of choice or recruitment which is racially neutral will produce a disproportionate number of White Canadians.

Commission's Policy:

Some jurisdictions, particularly in the United States, have attempted to remedy long-established patterns of discrimination against various groups by requiring employers to hire quotas of people belonging to these groups. The Commission believes that this is a crude and simplistic approach to a complex problem. Such an approach casts doubt on the legitimacy of minority group achievements. Further, it betrays the basic principle of equality of opportunity if people are given jobs or promoted not because they are competent but because they belong to a minority group. Such reverse discrimination, though well-intentioned, is discrimination nonetheless. It still spells condescension, and in the long run it may do far more harm than good. In the short run, it may actually reduce opportunities for minority group members whose quota has been filled.

Human Rights legislation encourages employers to hire on the basis of merit alone, without regard to the applicant's membership in any minority group. The quota system strikes at the heart of this philosophy.

For these reasons the Commission supports a different approach to Affirmative Action, an approach that has two facets.

On the one hand, attention is paid to seemingly neutral personnel policies or hiring practices which, sometimes unintentionally, exclude some members of minority groups from successful application. The Commission regularly scrutinizes and questions what have long been accepted as bona fide occupational qualifications such as age, sex, marital status, height and weight, dress. It encourages the casting of hiring nets more widely into the community than has often been done before. It thus widens the pool of talent from which employers can select the person who can do the job best.

On the other hand, programs are encouraged which are designed to improve the qualifications and opportunities of traditionally disadvantaged groups. Employers are encouraged to consider not only an applicant's present level of competence but other factors such as potential, aptitude, and motivation. Upgrading pre-employment programs and on-the-job training can be mounted with the cooperation of government and industry.

Special Employment Programs under Section 6(a):

Section 6(a) of the Code is an attempt to recognize the growing pressure from historically disadvantaged groups for "compensating" employment programs designed to alleviate the adverse effects of past discrimination in education, training and career development. This Section counters the excuse frequently given by employers for not initiating affirmative action on the grounds that such efforts would violate the Code.

The intent of this Section is to increase the employment of members of a group or a class because there is an imbalance in the number of persons employed by reason of past discrimination on the grounds of race, creed, colour, nationality, ancestry, place of origin, age, sex, and marital status.

Although the enforcement of Sections 1 to 5 of the Code is governed by the merit principle, the impartial application of this principle frequently has the effect of excluding minorities and women from employment. The social policy of promoting equality of opportunity and the need for corrective employment practices requires a new concept of merit, in which potential, aptitude for training, motivation and interest are the major criteria for selection.

In the enforcement of Section 6(a) it is recognized that merit must be defined according to the job requirements and the employer's needs. But demonstration of competence and experience is not possible for many minority and female candidates who have never been accorded a competitive opportunity and the merit principle is not subverted if it can be demonstrated that the candidate is able and motivated to obtain the job requirements.

For the employer's part, a special employment program can widen the pool of qualified applicants with members of groups who have been hitherto adversely affected by the benign application of the merit principle.

The full utilization of minorities and women in employment is compatible with the need to improve productivity and profitability. Benefits to employers include:

Increased productivity of minority and female employees through better use of their skill potential and abilities.

Improved motivation through clearly defined career opportunities.

Decreased turnover through job enrichment and reduction of dead-end jobs.

Filling more vacancies by promotion from within, resulting in reduced recruitment and training costs.

A greater range of job candidates available for consideration.

Not all affirmative action programs require Commission approval under Section 6(a). Those initiatives which develop out of compliance casework and community problem solving, in which employers are urged to expand the pool of potential job applicants by changing those practices which gave rise to the complaint, can be implemented informally. In such programs, the merit principle operates to determine the final selection.

Bona Fide Occupational Qualifications:

Section 4(6) of the Code is designed to permit preferential hiring where age, sex, or marital status is a bona fide occupational qualification or requirement for the position. But many employers exclude, or limit the opportunities of, minority groups and women by stipulating "bona fide" occupational qualifications which are, in fact, not job-related. A legal opinion on the Metropolitan Toronto Police stipulation of separate height and weight requirements for male and female applicants states that:

> Several U.S. cases have questioned the validity of arbitrary height and weight requirements and have found them to be discriminatory not only against women but also against shorter races ... the test is whether there exists an over-riding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business, thus, the business purpose must be sufficiently compelling to override any racial impact....

Clearly, non-job-related criteria serve to limit the opportunities of minorities and women. The job description, recruitment, selection, screening, and employee evaluations should reflect valid, job-related staffing standards. The failure of job applicants to meet existing standards is frequently due to the fact that they are unduly restrictive and are selecting over-qualified persons. Indeed, certain screening and selection practices may also be poor predictors of job performance and aptitude. Others rely unduly upon subjective criteria; where possible, objective and measurable criteria should govern these standards.

Several types of practices which adversely affect minorities and women can be identified.

(a) The use of recruitment and staffing standards and entry qualifications that are not job related or valid. While the qualifications of a rejected candidate may differ from the employer's standard, they may be quite adequate to perform the job in question. Because the employer is not required to do other than prove an unbiased selection according to company standards, unduly high qualifications tend to perpetuate job ghettos as self-contained employment systems.

    A corrective affirmative action program was conducted with the Metropolitan Toronto Department of Ambulance Services, in which the employer organization dropped its height and weight restrictions, and replaced them with a more accurate and fair method of evaluating physical fitness. The former standard had virtually ruled out women and shorter races, and no evidence could be found that a specific height and weight standard is a valid measure of job competence.

Another project involved Bendix Heavy Vehicles Limited in affirmative recruitment, training and promotion strategies for Native persons, and with the co-operation of the Department of Indian Affairs, Canada Manpower, and Native organizations, candidates were selected on the basis of aptitude, motivation and interest. The Ontario Teachers Federation received approval under Section 6(a) to conduct a special teacher training program for Native persons.

Other programs were implemented with employers and advertisers who specified that job applicants must have "Canadian experience." Because this stipulation frequently served to screen out recent immigrants, employers were told they must specify a particular type of experience, and demonstrate its relation to the job.

(b) The use of recruitment, evaluation, training or promotion methods which are not valid measures of job capability and/or which operate to select over-qualified applicants. Such methods include entrance tests and other screening instruments used to evaluate qualifications which do not enable an accurate assessment of merit or potential.

For example, minority and female applicants for jobs as life insurance agents who take the Life Insurance Marketing and Research Association tests are found to perform as competently as white male agents in spite of their tendency to fail the test at a rate of 20 per cent more than this group. The test contained an inherent bias towards selecting the white male agent. The test is now discontinued in Ontario.

(c) The use of recruitment methods which limit the competition to a narrow and non-representative sector of the population. Many employers, for example, recruit from eligibility lists on which interested applicants place their names, rather than advertising job openings. Other employers and unions rely on word-of-mouth contact as a recruitment method. Minorities and women have less access than others to these informal networks of employment information.

The Commission initiated an affirmative action program with the City of Toronto Fire Department, which effected the replacement of an eligibility list with an active recruitment policy involving the daily and minority ethnic press and community and minority organizations.

Reverse Discrimination and Preferential Hiring:

Affirmative action under Section 6(a) must be undertaken under carefully controlled and supervised conditions. Ideally, a project should be applied to all phases of the employment relationship and recruits should be given adequate training and counselling. A badly designed and implemented program can undermine future initiatives with the employer and can invite contempt for the objectives which underlie it.

Preferential hiring policies for members of certain groups are increasingly being established by governments and industry, and when such policies are not developed within the framework of an approved affirmative action program, they may place the employer in the position of being in contravention of the Code.

Moreover, a policy to hire preferentially is susceptible to charges of tokenism and condescension. This casts a shadow on the credentials of all minority group members and women whether their employment was attributable to a preference or to their own qualifications and achievements.

Some employer guidelines reflect a policy to accord differential treatment in employment to male/female applicants, at the expense of fair and reasonable merit and business necesssity considerations. In the McAleer decision (U.S. District Court, District of Columbia, June 9, 1976), a male alleged he was by-passed by a less qualified female who was promoted because of affirmative action requirements. Both the complainant and the female were judged to have valid claims to compensation, on the grounds that innocent employees should be protected from the burden of correcting past discrimination. This ruling may make American employers less willing to enter into affirmative action programs, if it means paying damages to majority group employees.

A legal opinion on preferential hiring states that, unless approved under Section 6(a), the practice is discriminatory and in violation of Section 4(1)(a), 4(1)(b) and perhaps 4(1)(e). If preferential hiring guidelines are published, there is a violation of Section 4(2).

Examples of preferential hiring practices include:

(a) Interviewing all applicants who are members of the preferred group. This practice leaves the employer open to charges from non-group members who were treated differentially and it could invite future charges of discrimination from members of the group when the practice is discontinued.

(b) Appointment of the member of the preferred group following a competition involving two equally qualified candidates, only one of whom is a minority or a woman.

(c) Delay of an appointment when its authorization is given too late to permit a reasonable search for a qualified member of the preferred group.

Such guidelines are not job-related and do not arise from reasonable considerations of business necessity. Reasonably defined and implemented recruitment and staffing standards, which are neces-

sary to the operation of the employer organization, cannot be met by a policy which subordinates the search for the best qualified person to the need for racial, ethnic, or sexual representation.

The principle of such preferential concern for a certain group is not new. Many civil services give preference to veterans in their hiring. Most private universities provide extra admission points to the children of alumni or to applicants from certain geographical areas. The structure of labour unionism is a method of establishing and protecting preference for union members. A long-standing function of the civil law is the redress for injury or damage done by one person to another.

The significant feature of Affirmative Action in Ontario is that it relies on persuasion rather than force. Its preferential concern for those who have been disadvantaged is not expressed at the cost of discrimination against others. Its concern is to maintain the merit principle in hiring by opening the market place to those whose merit is not now being tapped and by providing upgrading opportunities for those whose merit has never had a chance to reach its potential.

AFFIRMATIVE ACTION AND UNIONS

By
Debbie Field

We are all aware of the figures which outline women's unequal status in our society. The pay differential between men and women has increased 3 per cent over the last three years. Today the average female wage is only 53 per cent of the average male wage. Unemployment amongst women is higher than amongst men -- 44 per cent of Canada's unemployed are women, though women make up only 40 per cent of the labour force. 97.4 per cent of all secretaries are women, but only 3 per cent of registered apprentices are women.

The list could continue. What I would like to talk about today is the role of Affirmative Action in changing women's unequal status.

Ten years ago, when the women's movement began to discuss the difference between men and women's status in the work force, we focused on equal pay for equal work. We thought that the main source of inequality was that women and men received different wages for the same work. But it became clear that the problem was that men and women did different jobs. So the main reason that women are unequal in the labour force is because they are "ghettoized" in low paying, usually unorganized sectors of the economy.

Equal Pay for Equal Work legislation helped only a small percentage of women to achieve equality in the workplace.

To deal with this reality, the women's movement and the union movement have begun to talk about Equal Pay for Work of Equal Value. By comparing jobs done traditionally by women with those done traditionally by men, and demonstrating their equivalent value, it is hoped that further inequalities in the wages will be eliminated. Though it is true that a readjustment is necessary to give higher wages to work traditionally done by women, I don't believe that equal pay for work of equal value gets at the main problem -- that men and women do different types of work.

Equal Pay for Work of Equal Value is usually put into practice by job evaluation committees which evaluate one job against another. Such a process leads to competition amongst workers and the misconception that their work is paid according to market relations.

Instead of Equal Pay for Work of Equal Value I prefer to see women organize to convince their fellow workers that because of historic inequalities women's work is underpaid and that wage

---

Note: This paper represents my views and not the adopted position of the Ontario Public Service Employees Union.

adjustments are today necessary. For example, in the last round of negotiations the Ontario Public Service Employees Union negotiated an extra 3 per cent for the members in the Clerical and Office Services categories. These two categories are at the bottom of the pay scale and predominently made up of women.

Supporters of Equal Pay for Work of Equal Value argue that when jobs traditionally done by women are better paid, men will do these jobs and job ghettos will begin to disappear. This is partially correct. For example, as the wages of grade school teachers, bank tellers and telephone operators have improved over the last few years, we have seen an influx of men in these jobs.

But how will women get into jobs traditionally done by men? This, I believe, is a more crucial question for the destruction of male/female inequalities. It is male jobs which are higher paid. Equal Pay for Work of Equal Value does not deal with this.

I believe it is time for us in Canada to talk about Affirmative Action programs which will get women into the skilled, semi-skilled, and labourer industrial working class jobs, now occupied primarily by men.

In the United States, Affirmative Action legislation has meant that a growing number of Blacks, Chicanos, and women are getting jobs which were previously done only by white men. By contrast the Affirmative Action programs in Canada, which are not part of legislation or contracts but are voluntary programs developed by provincial and federal governments or by private industry, have focussed on women getting into management. The little success of Canadian Affirmative Action programs is a result of this vertical rather than horizontal focus. By the very nature of the economic organization of our society, there are very few management jobs. So programs with a vertical advancement focus only make changes for a handful of individuals. On the other hand, Affirmative Action which focuses on getting large numbers of women into the skilled non-traditional jobs can drastically alter the composition of the work force and the wages of women workers.

In a society like ours, in which money earned is a crucial element of social power and prestige, women entering these higher paid industrial jobs is crucial to winning social, as well as economic equality, for women.

I am in favour of unions negotiating for Affirmative Action programs for women, and eventually for government legislation. These programs should include quotas. Quotas are necessary to make sure that the program actually works. For example, Local 1005 of the United Steelworkers of America, the local in Hamilton which represents the people who work for Stelco, should negotiate for quotas in women hired and women taken into apprentice programs - 3 per cent women apprentices this year, 5 per cent apprentices next year; 5 per cent women hired overall this year, 10 per cent next year.

Stelco hasn't hired women in the vast majority of its facilities (the tin mill and the office are the two exceptions) since World War II. What this means is that women in the Hamilton area have been excluded from the 14 000 highly paid jobs at Stelco.

I suppose personnel at Stelco would argue that there aren't enough skilled women applicants, or that for every woman who applies there are five or six men who are more qualified.

There are several different issues involved here. First of all, during World War II thousands of women did semi-skilled and skilled industrial jobs. Arguments about lack of physical strength or aversion to dirt didn't seem to hold much water when the economy needed female workers. If anything, women as a whole are stronger and healthier today than they were 30 years ago.

Second, there is a certain mystification about the strength and the resistence to dirt needed to survive a job in one of the key industrial plants. Many jobs done by women in female dominated job ghettos -- either in the electronics industry or in light assembly plants -- require as much strength or resistence to dirt as working at Stelco. But because these industries are not as central to the economy, because the unions which organize them are not as strong, and because mainly women work in them, pay in these industries is half to one third of that in Stelco.

Third, raises the need for training programs and Affirmative Action quotas. If Stelco chose to do so, it could hire 100 women tomorrow who are as skilled as the men they are hiring. But, because of the sex streaming process which begins in grade school, it is a fact that many women who would like to work at Stelco do not have industrial work experiences. Most women did not take shop in high school, nor did they work on a construction site for their summer job.

Most women's work experience is in white collar jobs, in the service, educational or health sectors, in light industrial jobs. But why is this the case? It is neither because women cannot do the labourer, semi-skilled or skilled industrial jobs; nor because women do not want to do these jobs. It is because of the historic division of labour in our society which has streamed them into other jobs and excluded them from these jobs.

It is for these reasons that <u>preferential</u> hiring, <u>preferential</u> training, and quotas are needed. If we are serious about equality, we must stop penalizing women for the different training they have received.

Preferential hiring means that a special effort will be made to hire women. It means that all skill factors being equal, an employer will hire the woman over the man even if the man has more experience. It means giving women a special chance in training programs so they will get the experience.

If we are serious about equality, special provisions are also necessary which ensure that when layoffs occur, women's recent gains are not wiped out altogether as they, the last hired, become the first fired. We need, also, to talk about preferential seniority, preferential layoffs.

In 1975, Inco in Sudbury hired 250 women (of their overall work force of over 14 000). With the 1977 and 1978 layoffs most of these women have been laid off. The result is that only 30 of the women are left working at Inco.

Preferential layoffs and preferential training are difficult demands to raise because they cut across a crucial safeguard of the union movement -- the seniority system.

The seniority system is a gain of the union movement. Fought for and won in the 1930s, seniority protects employees from arbitrary firings. It also protects older workers, whom employers would often like to replace with younger people that they could have work harder and pay less.

But there is another side to seniority. The plain fact is that when women have been kept out of jobs and promotions for decades by discrimination, strict seniority can be used to preserve and perpetuate that discrimination. For example, strict seniority would keep women from access to the appropriate programs at Stelco since there will always be men who want to set into the apprentice programs and have more seniority than they. Strict seniority, which means layoff by seniority lists, (last hired, first fired) would mean that the few women who manage to break through the prejudice of an employer and get hired will be unemployed as soon as layoffs begin.

I think that the union movement must fight against all layoffs, since I believe it is a basic human right to work. But while we wage this fight, we must be careful that women are not made the brunt of current layoffs. If I were one of the 250 women hired by Inco in 1975 I would have tried to win my union to a position of opposition to the layoffs. If there was not enough work available for Inco employees during a 40-hour week, then a shorter workweek, with no reduction in pay should have been introduced. (Thirty-two hours of work for 40 hours pay is the demand endorsed by the Canadian Labour Congress.)

But I would also have insisted that layoffs not be used to reduce the percentage of women at Inco. Preserving a minimum quota of jobs for women is important in making sure that women don't suffer the most when layoffs occur.

Another valuable demand is plant-wide seniority rather than seniority by department or category. This measure can somewhat reduce the vulnerability of women to layoffs who often have lengthy plant-wide seniority but have only recently moved into the better-paying job categories.

The seniority system is important to defend. I am opposed to legislated changes in the seniority system by the government. But since the seniority system is something the union movement fought for and won, I think it is possible for us to determine certain modifications in it as we see fit to preserve the overall gains of the union movement. For example, after World War II when the soldiers came back, thousands of women with five and six years seniority where bumped because the union movement felt that it was in the interest of the whole society that men be given those jobs. It is doubtful whether there was much cry then in the union movement about destroying the seniority system, as there is now when the word quota is mentioned. The point is that in order to protect the most oppressed within our midst, in order to ensure that women (or women and minorities in the United States) do not bear the worst aspects of the current economic crisis which is resulting in mass layoffs, the union movement should selectively negotiate changes in the seniority system.

This is more than just a humanitarian call. As long as women are excluded from the higher paying industrial jobs traditionally done by men, women as a group are forced to work for half to one-third of men's wages, all wages are kept down. As long as an employer can pay these lower wages to women, men's wages, and the strength of unions in negotiating higher wages for all its members, are lowered.

Seen in this light, Affirmative Action programs are crucial for women to achieve equality in the work force, and for the unity of men and women workers.

AFFIRMATIVE ACTION - BELL CANADA

By
A.E. Richards

Bell Canada's policy in the recruitment and utilization of employees is based on the principal of equality of opportunity in the workplace.

While "Affirmative Action" aims at enabling underrepresented or disadvantaged groups to compete more successfully, it is Bell's position that this competition must still be based on merit, rather than on any type of quota or discriminatory practice. It is our belief that this is fundamental in the building of a sense of equity and high morale in all employee groups in the Company.

Based on this concept of equality, affirmative action that Bell has undertaken is clearly of the type which aims at eliminating bias, rather than introducing it.

Examples include:

1. Elimination of different salary treatment for men and women (1969).

2. Elimination of difference in pension plan provisions for men and women (1971).

3. Appointment of EEO co-ordinators in each of the six sub-corporate organizations in Bell (1975).

4. The publication of a quarterly report on the utilization of female employees in management, and of male and female employees in non-traditional work, was initiated in 1975.

5. A tool and equipment study has been undertaken in order to remove barriers to employment of small-statured people in craft work wherever possible.

Bell's corporate objective is to ensure that all theory and practices are aimed at elimination of any possible bias from a work-place where thousands of different managers make decisions daily concerning human resources. To this end, Bell has a special program which has two major thrusts:

1. A Diagnostic Study technique which involves identifying the "ideal" condition which should exist in each of nine specific areas involving human resources: recruiting, selection, placement, appraisal, training, career planning, salary, benefits, and labour relations. By auditing actual performance in each area against the "ideal" condition, Bell management has a method of

identifying and correcting any systemic bias in the personnel sub-systems. This program is still being developed, but it has been trialed in two areas, and it holds promise as a systematic and useful management tool in the EEO field.

2. The second thrust is to make management sensitive to the objective of maximizing utilization of human resources, and recognizing and eliminating any bias that may obstruct attainment of that objective. These awareness sessions started in 1975, have been updated as required, and are ongoing.

WORKSHOP ON

SENIORITY, PROMOTIONS AND LAYOFFS

Resource Persons:

Richard Nolan (Chair)
Canadian Human Rights Commission

June Green
Canadian National

Callie Bell
Ontario Human Rights Commission

Mike Walsh (Recording Secretary)
McMaster University

SENIORITY, PROMOTIONS AND LAYOFFS - EXPERIENCE AT CN

By
June Green

Introduction

To start our workshop discussion on "Seniority, Promotions and Layoffs" in the context of Race and Sex Equality in the Workplace, I would like to share with you some of the experience we at Canadian National Railways have had since the Canadian Human Rights Act was passed as well as to make some general comments about the challenges facing all of us.

Canadian National Railways employs some 68 000 persons, 83 per cent of whom are unionized.

In January 1978, as a major employer under federal jurisdiction and subject therefore to the Canadian Human Rights Act, Canadian National was asked by the Conference Board to comment on the impact of the legislation on collective bargaining.

Anticipated Problems

We foresaw two short-term impacts of the legislation.

First, a review of all existing collective agreements would be required to ensure that not only the intent but also the effect of collective agreement provisions conformed with the provisions of the Canadian Human Rights Act. Specifically we could foresee potential problems in respect to the seniority principle.

The second problem area that we anticipated was the probable impact of the legislation on the grievance procedure.

Let me elaborate on some of the problems we thought might arise.

The principle of seniority, in itself, is not discriminatory. However, seniority provisions may have a two-fold discriminatory impact on minority workers. First, the unit of seniority may be so narrowly defined, in terms of embracing primarily minority employees, that the effect is to discriminate against minority employees in terms of either the number of jobs available or the number of promotional opportunities.

If an employer deems a seniority unit to have a discriminatory effect, he must seek to rectify the situation through the collective bargaining process. As those units were established to protect the rights of their respective members, what is the probability that the bargaining agent for those members will be willing to negotiate a revised seniority unit? Management will be asking labour to bargain away seniority rights to which a majority of their members have been entitled.

A second and perhaps more fundamental problem is the principle of "last-in, first-out" in the case of layoffs. In the United States, the effect of Equal Employment legislation and affirmative action programs has had a significant impact on the principle of reverse seniority in the case of layoffs. As in many instances female employees and other minority workers have relatively short service, the courts have argued that in the case of layoffs plant wide seniority ought to be used to avoid disproportionate layoffs amongst minority workers in those situations where they have only recently gained access to certain jobs.

In the short term, the parties to collective bargaining must also come to grips with the problem of the impact of the legislation on the grievance procedure.

The act provides special procedures for the handling of complaints under the legislation but states that the alleged victims of discriminatory practices must first exhaust grievance procedures available to them before the complaint is dealt with by the Commission. Is it necessary to insert a clause into agreements prohibiting discrimination on the prescribed grounds, does the prohibition of discriminatory practices automatically form part of collective agreements by virtue of the enactment of the Canadian Human Rights Act? In the United States, arbitrators have relied upon the "just cause" expression found in grievance procedure provisions to rule on discrimination. They have argued that those causes which are forbidden by federal or state statutes cannot be "just cause."

Another problem we foresaw was the impact of the legislation on the number of grievances a union must carry forward. Would unions now carry forward grievances, that they would otherwise reject as not valid, in order to protect themselves against charges of discrimination? To allow indiscriminate individual enforcement of rights under the collective agreement might threaten the effectiveness of the union by undermining its ability to compromise the frequently conflicting interests of its constituency.

Finally we anticipated a conflict in respect to jurisprudence under the Act depending upon whether an employee filed discrimination complaints under the grievance procedure of his or her collective agreement or through the complaint process established under the Canadian Human Rights Act. Dual sources of interpretation could cause conflicts as decisions could flow from arbitration or from Human Rights Tribunals.

Experience Under the Canadian Human Rights Act

To what extent have these problems been encountered?

Our experience is limited as Canadian National has received few complaints of discrimination on the basis of sex or race since the Act went into effect.

Seniority units within Canadian National are not aligned on the basis of sex or race. In general, seniority units are relatively large and thus the unit itself does not tend to restrict the promotion of minority workers. (Having made this broad statement, I must add that in the case of those craft jobs represented by craft unions, the very nature of a craft union implies a restricted seniority unit. In the railway, this restrictiveness is offset to a degree by a common wage structure for tradesmen whereby craftsmen in all trades are paid the same wage rate, likewise in the case of apprentices.)

Since Canadian National does not maintain employee statistics on the basis of race or national origin, I cannot comment on the impact of layoffs on minority groups other than in the case of female employees.

The general argument is that in times of economic slowdown, minority workers with relatively short service are hardest hit by layoffs.

In the CN's case, female employees have not experienced a disproportionate per cent of recent layoffs. Essentially, there are two general groups of female employees. The first group covers a broad range of clerical jobs traditionally open to both men and women. In this group, women hold jobs from those with the highest rates of pay to those with the lowest. In effect, they are distributed throughout the seniority group and thus would not face a disproportionate number of layoffs.

The second group is composed of those women who are employed in what in the past had been regarded as traditionally male jobs, such as Brakemen, Tradesmen and apprentices. While our layoff data has not been analysed to determine the male/female impact, there are some general conclusions that I can draw based on the overall profile of the jobs involved. First the incidence of layoff amongst these jobs is low, particularly in the case of tradesmen. Secondly, while women have been employed in these so-called "non-traditional" jobs right across the country, the majority of them are employed in Western Canada. Given the shift in economic growth and the corresponding shift in railway traffic to the West, the probability of layoff is slight. Thus in the short term Canadian National may be able to avoid a disproportionate impact of layoffs on female employees.

But, as I have outlined, the problem has been avoided due to a particular set of circumstances facing the railway today. I do not believe that this holds for industry at large. In fact, the Canadian Labour Congress in the July 27th issue of Canadian Labour described the situation at INCO as follows:

> In fact, a handful of the 11 700 union members are women, but most of INCO's first female employees have been laid off because they had little seniority when the Company reduced its work force by 2 800 in Sudbury early last year.

Given the pessimistic economic outlook for the next few years, we can expect the principle of reverse seniority in the case of layoff to seriously erode the gains made by minority workers.

The layoffs to which I have been referring are general layoffs of staff caused essentially by adverse economic conditions. In the case of the layoff of individual employees for failure to meet Company standards, a number of complaints have been filed with the Canadian Human Rights Commission alleging that Canadian National has discriminated on the basis of religion or physical handicap. While the vast majority of complaints that CN has received since the Act went into force relate to the question of physical handicap, the complaints regarding discrimination on religious grounds are probably more relevant to the discussions of this workshop.

The complaints have arisen because the employees involved declined to wear safety "hard-hats" because their religion requires them to wear a certain head-dress.

In line with our responsibility for employee safety under Part IV of the Canada Labour Code, Canadian National has designated work areas in which the wearing of "hard-hats" is mandatory. Over the past three years our hard-hat policy has significantly reduced the number of head injuries sustained by our employees at work. Thus the Company believes that the requirement to wear safety hats is a bona fide occupation requirement.

While these cases have yet to be resolved, they do highlight the growing challenge to management to reconcile oft times conflicting responsibilities under different pieces of social and labour legislation.

From a labour relations viewpoint, another concern must be the possible conflict between the use of the grievance procedure in collective agreements and the filing of complaints with the Human Rights Commission.

Prior to the enactment of human rights legislation, unions in the railway industry had tended to avoid arguing grievances on the basis of discrimination and argued cause, that is, violation of a provision of the collective agreement. I am not saying that no grievance involved discriminatory practices but rather that unions sought resolution based on interpretation of the collective agreement.

Since the Canadian Human Rights Act was passed, we have not seen a change in the type of grievances filed nor an increase in the number of grievances. While we had foreseen that there might be an increase in the number of grievances as unions carried forward grievances they would have otherwise rejected, to date this has not happened. However the problem of reconciling the perceived rights of individual members with the rights of the majority is one that unions must now face more frequently. I do not know of any railway union

being charged with discrimination under human rights legislation. But a number of railway unions have received complaints of unfair representation under the Labour Code as employees believe their particular case ought to be carried through to arbitration.

While it is too early to draw firm conclusions, there may be a tendency for employees to use the complaints process rather than their grievance procedure.

For example, last month we received a complaint regarding discrimination together with a corrective course of action suggested by a Human Rights officer. Upon investigating the case, we found that a grievance had been filed last fall and had been resolved by the Company and the union last October. Moreover the resolution of the grievance was identical to the course of action being suggested by the Human Rights officer.

This case highlights two problems. First it questions the effectiveness of communications between the Company, union and the employee in this grievance. Secondly, it raises the question of whether or not the Canadian Human Rights Commission require employees to exercise their rights under their grievance procedure before accepting a complaint under the Act.

A recent U.S. article on sex discrimination in the Labour Law Journal found:

> Further search of the reported cases shows a virtual cessation of arbitration calling for equal pay for equal work after the Equal Pay Amendment and Title VII. The primary reason was because now the female employees had the federal government as their advocate, and they appeared before federal judges who interpreted a specific statute, rather than before arbitrators who interpreted collective bargaining contracts.

If the same pattern develops in Canada, that is, minority workers who are members of unions use legislative recourse rather than their rights under the grievance procedure, then the challenge of establishing equality in the workplace will be complicated by a twofold problem.

In the short-term, employers against whom complaints are filed with the Human Rights Commission will be forced to seek resolution of the complaint with the individual employee. If the complaint is upheld and involves a change in policy or practice covered by collective agreement, the employer then would have to negotiate a revision of the collective agreement with union representatives who have not been party to the complaint process.

In the short-time, this will add further tensions to labour - management relations in the workplace.

In the long-term the availability of a dual complaint grievance process could challenge the raison d'être of unions - protection of employee rights.

SENIORITY, PROMOTIONS AND LAYOFFS - ONTARIO LEGISLATION

By
Callie Bell

Whereas it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin, the Ontario Human Rights Code has provisions which deal with the matter of seniority, promotions and layoffs.[1] In this respect, the Ontario Human Rights Code states,

> No person shall,
>
> (a) refuse to refer or to recruit any person for employment;
>
> (b) dismiss or refuse to employ or to continue to employ any person;
>
> (c) refuse to train, promote or transfer an employee;
>
> (d) subject an employee to probation or apprenticeship or enlarge a period of probation or apprenticeship;
>
> (e) establish or maintain any employment classification or category that by its description or operation excludes any person from employment or continued employment;
>
> (f) maintain separate lines of progression for advancement in employment or separate seniority lists where the maintenance will adversely affect any employee; or
>
> (g) discriminate against any employee with regard to any term or condition of employment.
>
> because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin of such person or employee.[2]

In addition, with respect to trade unions, the Code specifies, "No trade union shall exclude from membership or expel or suspend any person or member or discriminate against any person or member because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin."

Similarly, "No self-governing profession shall exclude from membership or expel or suspend any person or member or discriminate against any person or member because of race, creed, colour, age, sex, marital status, ancestry or place of origin."

Seniority is usually very clearly defined in collective agreements. However, in non-union companies the definition and interpretation of seniority varies to suit the particular operation. Most

union agreements specify that seniority is based on continuous employment. Seniority is effected after achieving the probation period, in matters of promotion, demotion due to layoffs or recall subsequent to the layoffs. There are provisions, however, in most contracts that the employee must have the ability to perform the job.

When the employer decides who has the ability (for example, in respect to layoffs) sometimes minorities (men or women) perceive race or sex discrimination when they actually are laid off because of seniority. In one case Miss Velma Pencoff complained that Glaverbel Glass laid her off in 1976 because of work shortage, whereas, men with less seniority had been retained. As the Commission was unable to settle the complaint, the hearing was scheduled. Just prior to the hearing the parties agreed to settle the matter. The company paid Miss Pencoff $4 000 in full settlement of her claims against the company.[3]

In other cases of race and sex discrimination the parties have agreed to resolve the matter. In such cases compensation in four and five figure settlements has been involved as well as memoranda to staff, management seminars and the posting of bulletins to confirm the company's policy.

There have been occasions when companies have approached the Commission to acquire an exemption from the Ontario Human rights Code in respect to layoffs and recall situations. Such companies have maintained that the women on their staff would not be able to do some of the very heavy jobs of people with less seniority. In the event of a general layoff, the more senior women could have been terminated in the event that they were unable to perform or refused to perform the heavy jobs in question. In the majority of companies where such requests have been investigated by officers, it has been found that women could do the majority of positions in question. However, in the couple of exemptions that the Commission has granted, the lifting involved 69 pounds in one case and heavy moving and lifting jobs in general. Nevertheless, any woman still has the right to be hired, trained or promoted to one of these positions based on her ability. Generally in these situations, however, women had not performed the task to date and the women in the company did not feel that they were able to perform the very heavy jobs in question. It should be noted, however, as working conditions change and more mechanical moving and lifting devices are becoming increasingly available, every exemption is subject to review at any time by the Commissioners.

In 1974, 13 women were laid off out of seniority and alleged that it was based on their sex. Several of these women subsequently laid complaints and later were also refused promotions for the jobs which the company had decided they were not qualified to do, for reasons based on their sex. As a result of the complaint, the women were offered the next jobs which became available in the heavy classification. Once promoted, they said they had no difficulty carrying those responsibilities.

The majority of the complaints which come to the Hamilton office in respect to layoffs are regarding individual terminations. One third of the current complaints in Hamilton entail allegations regarding sexual harassment. In such cases which have been conciliated, complainants found it reasonable to accept total compensation for wages lost.

Another type of layoff which can affect not only the racial minorities and women but the entire work force is termination due to compulsory early retirement. The Commission has had four Boards of Inquiry over the compulsory retirement age of 60 agreed to between many municipalities and their respective firefighter associations. It has been the Commission's position that voluntary retirement at any age is quite acceptable. However, even multi-nationals still come to our attention where a company may perhaps have a retirement age for women at 62 and men at 64 or have for some reason not allowed employees the option of continuing their employment until 65 for reasons based on their age. In such cases, the Commission takes complaints and investigates them.

In the Commissioners' report Life Together, 1977 they recommended the age of retirement be open.

Racial name-calling resulting in individual terminations also gives rise to complaints at the Ontario Human Rights Commission. At the Board of Inquiry between Ford of Canada (Ontario Truck Plant) and Keith Simms, Board Chairman, Horace Krever, who was more recently promoted to be a Supreme Court Judge, discussed his opinion on the word "discriminate" deciding whether or not Simms had been discriminated against because of his race and colour in this matter.

"In my opinion, the word "discriminate" in the context of the Code means to treat differently or, in the particular context of section 4(1), to make an employee's working conditions different (usually, in the sense of less favourable) from those under which all other employees are employed. Thus, to permit, even passively, a black employee in a plant where the majority of employees are white to be humiliated repeatedly by insulting language relating to his colour by other employees, even, I would go so far as to say, by non-supervisory employees, would be to require the black employee to work under unfavourable working conditions which do not apply to white employees. In such circumstances the employer has an obligation, imposed by section 4(1), to remove the cause of the discriminatory working conditions and police the prohibition against the humiliating conduct or language. But where, the employer, had no reason to anticipate that an isolated insulting act would occur, it cannot be said that, if and when it does, the mere occurrence immediately puts the employer in violation of section 4(1). Finally, where, on such an isolated occurrence, the employer does not, but does not in good faith, believe that such conduct, on the part of one of its supervisory personnel, has occurred, and, as a result of such disbelief, does not discipline the offender, there is again, in my view, no violation of section 4(1) of the Code on

the part of the employer. I need hardly add that a finding of bad faith might well change the result. Perhaps, to complete this discussion, one should repeat that this analysis is with relation to proceedings before a board of inquiry under the Ontario Human Rights Code 1961-62. What the result might be in an arbitration under a collective agreement of a grievance alleging a violation of a collective agreement I refrain from speculation about."[4]

As a result of a layoff at Ralph's Milrod Metal Products Ltd., 17 complainants alleged that they had been dismissed for reasons based on their race and colour. As the matter could not be settled a Board of Inquiry was appointed under Chairman of the Board of Inquiry, W.S. Tarnopolsky. However, on the day of the hearing the parties notified Dr. Tarnopolsky that they had decided on a settlement. Settlements reported that the respondent paid the complainants the sum of $27 000 damages for breach of contract to be shared by the complainants in accordance with their agreement.

As unions which are hiring halls have a unique function of referring their members for employment, they have the power to determine who is called for what job and when. The complexities of this can be numerous, for example, if a non-White alleges racial discrimination in referral for employment, it is very difficult for an officer to observe or prove whether, in fact, discrimination has taken place. It is not uncommon in such hiring halls that if one has a job with an employer for under three days, that individual's name stays at the top of the list. If, however, the individual is employed for four days or longer the individual's name goes to the bottom of the list when he reregisters for employment. The union representative who calls people for employment makes the decision of who to call when, in-as-far as there may be dozens of people who registered for employment on one particular day. It is not difficult for a union representative to note that they called individuals, noting that no one was at home or the line was busy. The variables are many. The union representative determines who should be called for the four-day job and who should be called for the job which would last for several years. Such variables make it difficult to know whether an act of discrimination has taken place. Just as we work with employers on an educative basis, we work with unions to create human rights committees and to promote more understanding of the legislation and the philosophy of the Ontario Human Rights Commission. We encourage human rights clauses in contracts so that the specific human rights issues can be grieved and be resolved through the grievance process.

We also encourage labour leaders to examine their contracts to see whether they are actually negotiating different pay rates for jobs which traditionally were male and female so that both sexes are paid based on their skill and ability. If in fact all plant labour positions are of equal value, the unions might negotiate on that basis.

There are still very few companies that have one pay rate for all the workers with relatively the same level of skill. In any operation where there was $1.40 difference in 1970, when there were separate lines of seniority and progression for women, that differential remains.

Promotions are secured in companies sometimes through a posting and sometimes through word-of-mouth depending on whether there is a union or not. In the event of a labour contract where jobs must be posted, we still find complaints where the company has determined that the individual is not qualified and the individual believes it is based on sex or race. In some cases these are results of the grievance process. In other cases people lay complaints and they are resolved through conciliation. One case comes to mind where a young woman asked for clarification why she had not received a promotion for a position that had been traditionally occupied my males. The head of personnel explained to her that it was very heavy work. Having seen the job performed, the woman was not satisfied with this explanation and complained to the Human Rights Commission. The personnel manager explained to the officer the job involved lifting about 110 pounds. The plant manager told the officer that the job involved lifting about 100 pounds. When speaking to the foreman, the officer established that the only lifting involved for the position in question was picking up a gear box every three months for lubrication. The gear box apparently weighed 30 pounds. The woman secured the next such position that became available and had no difficulty doing it.

Any companies wishing to avail themselves of our resources to develop Affirmative Action Programs need only contact the Ontario Human Rights Commission. We are happy to co-operate in such joint ventures to help companies to hire, train and promote qualified minorities and women.

Bibliography

1. Ontario Human Rights Code, R.S.O., 1970 Chapter 318 as amended.

2. Ontario Human Rights Code, R.S.O., 1970 Chapter 318 as amended.

3. Report of Mary Eberts, a Board of Inquiry, appointed to investigate Miss Velma Pencoff, against Glaverbel Glass Company, July 12, 1978.

4. Report of Horace Krever, a Board of Inquiry, appointed to investigate Keith Simms, against Ford of Canada, June 4, 1970.

SUMMARY OF THE CONFERENCE

"IMPLICATIONS FOR POLICY-MAKERS"

By

Professor Joseph B. Rose

McMaster University

At the outset of this conference on race and sex equality in the workplace, we were advised that our discussions would raise many complex and emotional issues. Without a doubt, the events of last night and today have demonstrated the wisdom of this observation. Accordingly, I would like to keep my remarks general rather than summarizing individual papers. The major thrust of my comments will deal with affirmative action and equal pay for work of equal value.

Affirmative Action

For those of us who may have thought of discrimination merely in terms of prejudical acts directed at a specified individual or group, the conference undoubtedly provided a broader perspective. We have heard that discrimination is not only a by-product of prejudicial motives, but may also be perceived in terms of unequal treatment and the effects or consequences of actions, which on their face appear to promote equal treatment, but in reality produce unequal results, e.g., some seniority systems. The evolution of the concept of discrimination was brought into sharper focus by comparing its meaning in the United States, the United Kingdom and Canada. Unquestionably, the sources of discrimination in the workplace are many and include individual behaviour, organizational practices and societal values, e.g., social and economic beliefs.

Our discussions on remedies for discriminatory practices produced some predictable responses. Spokespersons for business advocated voluntarism and the need to limit government involvement in affirmative action programs. Labour representatives, on the other hand, voiced support for government intervention, while at the same time extolling collective bargaining as an appropriate procedure for dealing with discrimination.

There appeared to be a consensus favouring the adoption of affirmative action laws for Canada. To begin with, we were advised that there were no constitutional or legal impediments to this course of action. Moreover, the shortcomings of private solutions were evident. There are clearly limits to voluntarism, particularly in the corporate sector. In the absence of public policy favouring affirmative action what can we reasonably expect the business community to do? While the response would likely vary from one firm to another, it is likely that business still perceives its primary social responsibility more in terms of making profits than promoting social and economic justice. Accordingly, the probable response of the business community would be to assign affirmative action a relatively low priority unless pressured to do otherwise. If history is to be our yardstick, analogies can be made to the enactment of laws governing labour standards, collective bargaining and occupational health and safety.

While collective bargaining and grievance procedures provide some hope for remedial action, they can not be relied on exclusively. This was made evident in the session on seniority, promotions and

layoffs. There are also other factors which must be considered. Many women and minorities are indifferent to unionization and many unions are indifferent to organizing in those occupations and industries where these groups are concentrated. Similarly, collective bargaining does not extend to middle and upper echelons of management, nor has it made inroads among professionals in the private sector. Even in those sectors where women and minorities are organized, internal union politics may determine how vigorously the goals of disadvantaged groups are pursued.

There was general support for a shift in the way governments handle discrimination cases. In particular, the use of conciliation was criticized as inadequate. Critics suggested that strong laws enforced by the courts were required to stimulate change. They argued that affirmative action legislation would encourage business to develop their own programs for resolving discrimination rather than have them imposed by the courts. It should also promote employer-union cooperation to institute meaningful reforms. Such issues as equal pay, promotions, layoff and seniority lend themselves to joint bargaining.

There are, of course, several important public policy implications associated with the advocacy and implementation of affirmative action legislation and programs. The American experience clearly bears this out. In Canada, where the provinces retain jurisdiction in this area, we might reasonably speculate about the willingness of all of the provincial governments to enact meaningful affirmative action programs and commit themselves to such programs. One speaker expressed pessimism about the prospects in British Columbia.

Let me suggest another potential problem facing legislation of this type. There may be strong public resistance to any new and bold social experiments. In the United States, public restiveness about inflation, taxes and government spending have had major political repercussions. Recently we witnessed the passage of Proposition 13 in California and similar property tax proposals elsewhere. Similarly, there have been measures to restrict the level of government spending. At the federal level, President Carter has attempted to deregulate certain industries (airlines) and specified areas, e.g., occupational health and safety. These efforts seek to reduce the inflationary impact of government regulation and to promote competition and lower prices. This trend may spread north of the border, particularly in light of the larger the role of government in the economy and the burdensome Canadian tax structure.

The movement toward deregulations and fiscal conservatism is a direct challenge to progressive social legislation. No matter how noble the goal of equal employment opportunity in the workplace may be, its place in the pecking order of priorities will probably have to be assessed. As government pressure mounts to have us lower our expectations and "think small," affirmative action may have to wait its place in line.

Equal Pay for Work of Equal Value

In our deliberations on equal pay, there appeared to be widespread agreement that pay differentials based on race, sex and similar factors are repugnant. Yet, in trying to solve the problem, job evaluation has been heralded as the means for achieving equal pay for work of equal value. I must confess a certain uneasiness about this proposition. Rather than engaging in a long discourse over this matter, let me make three brief points.

1. There seems to be some confusion about what job evaluation means. It is simply a systematic process for rationalizing pay structures based on an analysis of job descriptions (what the job entails) and job specifications (worker requirements). Once the comparisons have been made, all of the jobs within the organization can be ranked from the most important to the least important. Job evaluation is a subjective process.

2. Job evaluation does not determine pay levels. Pay levels are usually determined by surveys and therefore reflect such factors as the labour market and collective bargaining. To suggest that job evaluation alone will provide equal pay for work of equal value is at best a naive proposition.

3. What does "equal value" mean? I believe there may be insurmountable problems associated with determining which dissimilar jobs within an organization are of equal value. Moreover, what happens when pay surveys reveal that these dissimilar jobs of equal value are not compensated equally? Another difficulty is that standard job evaluation techniques are not well suited to managerial and professional jobs, two areas where we wish to promote greater employment opportunities for women and minorities. There are tremendous problems defining and measuring such factors as the degree of responsibility of these jobs. Consequently, most pay decisions in these occupations not only reflect the value of the job, but consider individual differences. Job evaluation is no panacea, nor can it be relied on exclusively.

Before leaving this subject, let me suggest there is not only a need to examine equal pay, but to consider the total compensation package. In the future, greater attention should be placed on equal treatment in areas such as pensions, leave of absence for career development, maternity/paternity leaves, and other benefits.

Final Thoughts

Throughout this conference, speakers have referred to a dizzying array of statistics to buttress their arguments about discrimination. Unfortunately these data have, at times, been used loosely

and without regard to ascertaining the underlying causes of male-female pay differentials, labour force participation rates and occupational choice. For example, little discussion focused on the nature of women's attachment to the labour force. To what extent do the increased participation rates for women reflect a career orientation as opposed to a job orientation, e.g., taking a job to provide the family with a hedge against inflation? There seems to have been an implicit assumption that all women desire meaningful jobs and careers. This assumption is no clearer to me than the one frequently espoused by social scientists that all workers want their jobs enriched. Some undoubtedly do, but how many?

Let me also suggest that equal opportunity in the workplace will take considerable time to achieve. This is because cultural changes are an integral part of the solution. A number of recent books on women in management have commented on the importance of socializing agents such as parents, peers, and schools on female occupational choice. A shift in social values as well as affirmation action programs will be required if we are to remove barriers to specific jobs and careers, and if we are to protect the rights of women and minorities to compete on an equal basis. This constitutes a lofty goal and a major challenge to all of us for the future.

APPENDIX A - LIST OF SPEAKERS AND PANELISTS

Naresh Agarwal
Faculty of Business
McMaster University
Hamilton, Ontario
L8S 4M4

Lincoln Alexander, M.P.
House of Commons
Parliament Buildings
Ottawa, Ontario
K1A 0A6

Bromley Armstrong
Ontario Human Rights Commission
400 University Avenue
Toronto, Ontario
M7A 1T7

Callie Bell
Ontario Human Rights Commission
1 West Avenue South
Hamilton, Ontario
L8N 2R9

Claude Bernier
Compensation Consultant
Canadian Human Rights Commission
257 Slater Street,
Ottawa, Ontario
K1A 1E1

Alfred Blumrosen
Rutgers Law School
15 Washington Street,
Newark, New Jersey
07102

Arthur Bourns
President, McMaster University
Hamilton, Ontario
L8S 4M4

Thomas J. Carney
President, Greening Donald
Company Ltd.
P.O. Box 430
Hamilton, Ontario
L8N 3J3

Alice Carson
B.C. Government Employees Union
4911 Canada Way
Burnaby, British Columbia
V5C 3W3

Marnie Clarke
Director, Women's Bureau
Ontario Ministry of Labour
400 University Avenue
Toronto, Ontario
M7A 1T7

Gérard Docquier
National Director
United Steelworkers of America
55 Eglinton Avenue East
Toronto, Ontario
M4P 1B5

Debbie Field
Ontario Public Service Employee
Union
37 Melbourne Street
Hamilton, Ontario
L8P 2Z3

Ed Finn
Public Relations Director
Canadian Brotherhood of Railway,
Transport and General Workers
2300 Carling Avenue
Ottawa, Ontario
K2B 1H4

Frank Folz
Equal Opportunity Officer
Board of Education, City
of Toronto
155 College Street
Toronto, Ontario
M5T 1P6

Deirdre Gallagher
United Steelworkers of America
55 Eglinton Avenue East
Toronto, Ontario
M4P 1B5

APPENDIX A (continued)

June Green
Industrial Relations
Canadian National
Box 8100
Montreal, Quebec
H3C 3N4

G.M. Harper
Industrial Relations Manager
Procter and Gamble Co. of Canada
P.O. Box 589
Hamilton, Ontario
L8N 3L5

Grace Hartman
National President
Canadian Union of
Public Employees
233 Gilmour Street
Ottawa, Ontario
K2P 0P5

Harish C. Jain
Faculty of Business
McMaster University
Hamilton, Ontario
L8S 4M4

Marc Lapointe
Chairman, Canada Labour
Relations Board
125 Sussex Drive
Tower "D", 4th Floor
Ottawa, Ontario
L8A 0X6

A.E. Richards
Assistant Vice-President,
Personnel
Bell Canada
150 Beaver Hall Hill, Room 710
Montreal, Quebec
H3C 3G4

Peter Robertson
3829 North Woodrow
Arlington, Virginia
22207

Joseph Rose
Faculty of Business
McMaster University
Hamilton, Ontario
L8S 4M4

Dr. Andrew Szendrovits
Dean, Faculty of Business
McMaster University
Hamilton, Ontario
L8S 4M4

Walter Tarnopolsky
Canadian Human Rights Commission
257 Slater Street
Ottawa, Ontario
K1A 1E1

Peter Tucker
Manager, Employee Relations
Royal Bank of Canada
1 Place Ville Marie
P.O. Box 6001
Montreal, Quebec
H3C 3A9

B. Ubale
Ontario Human Rights Commission
400 University Avenue
Toronto, Ontario
M7A 1T7

APPENDIX B - LIST OF CONFERENCE PARTICIPANTS

ADAMS, Roy	McMaster University
AGARWAL, N.	McMaster University
ALEXANDER, Lincoln	MP Minister of Labour
ANDIAPPAN, Prof. P.	University of New Brunswick
ARMSTRONG, Bromley	Ontario Human Rights Commission
ATKINSON, Katherine	Humber College
ATTENBOROUGH, Susan	National Union of Provincial Government Employees
BAKER, Lorraine	Canadian Employment and Immigration Commission
BARTLEY, Gary	Saskatchewan Government Employees Association
BELL, Callie	Ontario Human Rights Commission
BENEDICT, Daniel	United Automobile Workers
BERTI, Norma	United Steelworkers of America
BLUMROSEN, Alfred	Rutgers University
BORKOVIC, Blanche	Women's Bureau, Labour Canada
BOURNS, Arthur	McMaster University
BRIERE, Margaret	Bell Canada
BOYLE, Bob	Labour Canada
CARNEGIE, Ms. Lois	Ontario Public Service Employees Union
CARNEY, Thomas	Greening Donald Company Limited
CARSON, Ms. Alice	British Columbia Government Employees Union
CLARKE, Marnie	Women's Bureau, Ontario Ministry of Labour
CLIVE, Paul	Hamilton-Wentworth Regional Police

APPENDIX B (continued)

COKE, Yvonne	Canadian Employment & Immigration Commission
COOPER, Art	McMaster University
CORMIER, J.W.	Canadian General Electric Company
DAVIDSON-PALMER, Judith	W.M. Mercier Ltd.
DEACON, Grant	Fuller Brush
DOCQUIER, Gerard	United Steelworkers of America
DROBOT, Martin	McMaster University
EVANS, Cathy	McMaster University
EVANS, John	McMaster University
FERGUSON, Sally	Public Service Commission of Canada
FIELD, Debbie	Ontario Public Service Employees Union
FINN, Ed	Canadian Brotherhood of Railway, Transport and General Workers
FLAXMAN, Helen	McMaster University
FOLZ, Frank	Toronto Board of Education
FRASER, Ann	Labour Canada
FRASER, C.	McMaster University
FURGEN, Mayes	McMaster University
GALLAGHER, Mrs. D.	United Steelworkers of America
GANNAGE, Charlene	University of Toronto
GODDING, Kevin	McMaster University
GOETTLER, Vaughn	McMaster University
GREEN, June	Canadian National
HAMILTON, Ian	International Harvester
HAMILTON, Kathryn	Hamilton Psychiatric Hospital

APPENDIX B (continued)

HARPER, G.M.	Procter & Gamble
HARTMAN, Grace	Canadian Union of Public Employees
HARTMAN, Joseph	Retired
HICKEY, Johanna	Public Service Commission of Canada
HISCOX, R.J.	Canada Trust
HOSKING, David	Canadian Human Rights Commission
HUCKO, Paula	McMaster University
IRESON, G.	Hamilton-Wentworth Regional Police
JAIN, Harish C.	McMaster University
JANSEN, Kate	Womanpower
JENSEN, Jette	McMaster University
JOSVANGER, Laurel	Saskatchewan Government Employees Association
KAYE, Bob	McMaster University
KOWALSKI, Edita	Women's Conference Organization
LANGER, Susan	Saskatchewan Labour
LAPOINTE, Marc	Canada Labour Relations Board
LAVERTY, Paul	McMaster University
LEBANS, Trudy	Mohawk College
LEES, Rose	Ontario Public Service Employees Union
LEGEDZA, Carol	McMaster University
LEPIC, Ms. Mila	Ontario Manpower Commission
LOGUE, J.	Canadian Union of Postal Workers
MALCOMLSON, G.	Hamilton-Wentworth Regional Police
MARTIN, Karen	Retail Clerks Union

APPENDIX B (continued)

MASON, Kelsey	Sheridan College
McALLISTER, Elizabeth	Canadian Employment & Immigration Commission
McKAY, Gayle	Manitoba Government Employees Association
McLEAN, Barbara	Ontario Labour Relations Board
McLELLAND, Sandy	McMaster University
McNAMARA, Mary	Toronto-Dominion Bank
McNEIL, Morag	McMaster University
MIKULICH, L.J.	Town of Dundas
MOORE, Jim	McMaster University
MOORE, SEAN	Public Affairs
MURPHY, Mary	Commission des droits de la personne du Québec
NEYEDLY, Barbara	Ontario Public Service Employees Union
NG, Grace	McMaster University
NOLAN, Richard	Canadian Human Rights Commission
OGURIAN, Susan	Ontario Public Service Employees Union
OLIVER, Karen	McMaster University
PARKINSON, Mark	McMaster University
PARSONS, John	McMaster University
PENNY, Harry L.	McMaster University
POPE, A.E.	McMaster University
PUTNAM, David W.	International Harvester
RAMKHALAWANSINGH, Ceta	Ontario Institute for Studies in Education
RANKIN, Linda	Bell Canada

APPENDIX B (continued)

RAY, Dr. Ratna	Women's Bureau, Labour Canada
REID, Frank	University of Toronto
RICHARDS, A.E.	Bell Canada
RICHOT, Nicole	Canadian Human Rights Commission
ROBERTS, Alison	Women's Bureau, Ontario Ministry of Labour
ROBERTSON, Peter	Washington, D.C., U.S.A.
ROSE, Joseph	McMaster University
SARRA, J.	Ontario Public Service Employees Union
SARRA, Martin	Ontario Public Service Employees Union
SCHOLES, Audrey C.	Bell Canada
SEGERS, Anne	Stanley Works
SEIFERT, Margaret	Stelco
SHAKEEL, G. Sabir	Ontario Ministry of Labour
SHAW, Dennis	McMaster University
SIKAND, Suneela	Ontario Public Service Employees Union
SINCLAIR, Cam	McMaster University
SNYDER, M.B.	Stelco
SPEARS, Marnie	Bell Canada
STANLEY, Karen	Ontario Public Service Employees Union
STEIN, Lori	Womanpower
STEWART, Anne-Marie	Manulife
STONE, Ken	Letter Carriers Union
SWAN, Carole	Status of Women Canada
SZENDROVITS, Andrew	McMaster University

APPENDIX B (continued)

TARNOPOLSKY, Walter	Canadian Human Rights Commission
TAYLOR, Cecil	United Steelworkers of America
TAKHAR, Nirmal	Human Rights Committee
THIBERT, Chris	Ontario Public Service Employees Union
THOMPSON, Elizabeth Averil	McMaster University
TROY, T.C.	Stelco
TUCKER, Peter	Royal Bank of Canada
UBALE, Dr. B.	Ontario Human Rights Commission
VESPA, John	Municipality of Metropolitan Toronto
WALMSLEY, Prof. P.Y.	University of Saskatchewan
WALSH, Mike	McMaster University
WARDER, Simon	McMaster University
WILLIAMS, Tom	Professional Institute of the Public Service
WRAY, Coleen	Professional Institute of the Public Service
YAKIMOFF, Marie	Mohawk College
ZINSZER, Frank	Hamilton Brick Company